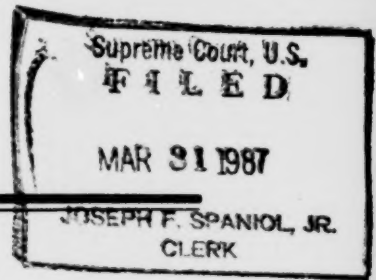


86 1599 (1)

No.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

HECTOR REUBEN SANCHEZ,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF ILLINOIS**

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QUESTIONS PRESENTED FOR REVIEW

1. Did the prosecutor's flagrantly improper cross-examination of the petitioner during the sentencing phase concerning speculations about the brutality of the offense and requiring the petitioner to "[t]ell the jury what mitigating factors would cause a jury to not oppose [sic] the death penalty on facts such as this" violate the petitioner's rights under the Sixth, Eighth and Fourteenth Amendments by (1) introducing irrelevant and unreliable factors in determining the appropriateness of the death penalty, (2) minimizing the jury's sense of its own responsibility for imposing the death sentence, (3) creating the danger that the jury concluded that the burden of persuasion was on the petitioner to show that his life should be spared, and (4) diluting petitioner's right to have counsel present the argument in mitigation.

2. Is the exacting standard of accuracy required by the Eighth and Fourteenth Amendments in death penalty determinations subject to a "harmless constitutional error" qualification as the majority opinion of the Illinois Supreme Court held in this case.

3. Were the petitioner's rights under the Eighth and Fourteenth Amendments violated when the court refused his mercy instruction and the jury, at the death penalty phase, was left without guidance in reconciling defense counsel's pleas for mercy with the court's instruction not to be influenced by sympathy.

4. Does the Illinois death penalty statute leave the risk of non-persuasion on the defendant, in violation of the Eighth and Fourteenth Amendments.

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OPINION BELOW

The opinion of the Supreme Court of Illinois is published at 115 Ill. 2d 238 (1987). The text of the opinion is attached as Appendix A. The text of the order of the Supreme Court of Illinois denying a petition for rehearing is attached as Appendix B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3). The opinion of the Supreme Court of Illinois was filed on December 19, 1986. A timely petition for rehearing was filed and denied by that court on January 30, 1987. This petition is filed within sixty days of that date.

CONSTITUTIONAL PROVISIONS

Amendment [VI.]

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the

witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment [VIII.]

Excessive bail, fines, punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment [XIV.]

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner, Hector Reuben Sanchez, was found guilty, by a jury, of aggravated kidnapping, rape, deviate sexual assault, attempt murder and murder. After a waiver of jury as to the eligibility phase of the death penalty hearing, Sanchez was found eligible by the court. The second phase of the death penalty hearing—aggravation and mitigation—was tried to the same jury that had heard the guilt phase of the case. Sanchez was sentenced to death.

Sanchez, who did not testify during the guilt phase of the trial, took the stand during the aggravation/mitigation phase of the death penalty hearing. The prosecutor cross-examined Sanchez as follows (Appendix A at 26-28):

“Q. Whoever killed her, whether it was Mr. William Garris or you, would you agree that she was butchered in a brutal, sadistic and cruel and inhuman fashion?

A. I could not tell you. I didn't see the body.

Q. Did you look at the pictures?

A. No. They never showed me no pictures.

Q. I'll show you a picture, Mr. Sanchez. Let me show you People's Exhibit 9, which has been previously identified, a photograph of a woman lying face down, her hands behind her and with cable around her neck and ask you to look at that for the first time and tell this jury if whoever killed her in your opinion killed that woman in a sadistic, brutal and inhumanly cruel manner?

A. Yes, that is what it looks like, I can't see. I just see the red.

Q. Do you see her hand tied behind her back?

A. Yes.

Q. Would you admit whoever might have killed Michelle Thompson, would you agree that she lived through unimaginable terror as she was dragged from that parking lot, kicking and screaming as the evidence indicated?

A. I would not know. I was not there. I don't know what happened.

Q. Well, you heard the testimony. What do you think, Mr. Sanchez. What do you think she lived through as she was dragged kicking and screaming?

A. Yes.

Q. And would you agree whoever killed her, the photograph of Michelle Thompson indicates she was beaten?

A. Yes.

Q. Savagely from head to toe?

A. Yes.

Q. Whoever did do it to her Mr. Sanchez, would you agree she was sodomized and her body ripped open?

MR. COLLINS: Objection. That is not the evidence.

BY MR. MARGOLIS:

Q. Would you agree, Mr. Sanchez—

MR. COLLINS: If your Honor, please, Mr. Margolis is using a colorful cross-examination. And at this point some of it is proper but it is going beyond the evidence in this case and he is doing it for the death penalty effect. I object to it.

MR. MARGOLIS: This is the proper time, Your Honor, to ask such questions of this witness.

MR. COLLINS: There is a proper time to ask questions that have something to do with the record and a body being ripped open is not proper.

MR. MARGOLIS: I will rephrase the question.

BY MR. MARGOLIS:

Q. Would you say, sir, that the way that Michelle Thompson was sodomized was ugly and brutal and despicable?

A. Yes.

Q. Tell the jury, sir, what mitigating factors would cause a jury to not oppose the death penalty on facts such as this?

MR. COLLINS: I object.

THE COURT: Sustained.

MR. COLLINS: If the court please, I would like to be heard on that question. If your Honor, please, there is no possibility that Mr. Margolis thought that last question was a proper question.

It is never the function of defendant to argue his own case. I would suggest that question is so grossly improper that I move for mistrial at this time.

THE COURT: Denied."

This point was raised in Sanchez' post trial motion and in his direct appeal to the Illinois Supreme Court. (C. 381 ¶ 18; Appendix A at 26-29) Three justices concluded, in

dissent, that Sanchez was denied a fair sentencing hearing as a result of the above cross-examination. (Appendix A at 35) The majority concluded that it was harmless error under the *Chapman v. California* doctrine, 386 U.S. 18 (1967). A petition for rehearing on the point was denied. (Appendix B)

Prior to this case, Hector Sanchez had no criminal record. He had come to the continental United States from Puerto Rico at the age of five. At that time he was considered a deaf mute but his inability to speak was surgically corrected. (Tr. 2802)

Petitioner is dyslexic; he can neither read nor write. (Tr. 2803, 2864) Nonetheless, he held a job at Johnson Motors for fourteen years, starting as a janitor and advancing to a position in furnace repairs. (Tr. 2865) Through thrift and hard work he was able to save enough to first obtain a share in an apartment complex, (Tr. 2866) and later to buy the land on which he built a house. (Tr. 2866)

Although Sanchez has a close relationship with his family, his deceased father abused him as a child and subjected him to irrational discipline. (Tr. 2801, 2815, 2862) At the age of thirteen or fourteen, using his own money, Sanchez went to see a "lady psychiatrist." (Tr. 2863) At trial, two sisters, a cousin, and his nephew testified for him. Hector expressed particular feeling for his seventeen year old nephew Ronnie, who was a good student and hoped to be an attorney. (Tr. 2810)

Sanchez also maintained a normal relationship for six and a half years with a woman. (Tr. 2756, 2762) During that time, she was never physically abused. (Tr. 2773)

All of this was brought out at the penalty phase, at the conclusion of which a "mercy" instruction was tendered

to but rejected by the court. (C. 364; Tr. 2846) That mercy instruction stated:

In considering the death penalty, you may, if you choose to do so, consider whether or not you wish to extend mercy to the defendant.

Instead, the jury was instructed at the conclusion of the penalty phase that “neither sympathy nor prejudice should influence you. You should not be influenced by any person’s race, color, religion or national ancestry.” (C. 373) Although defense counsel made a plea for mercy, the prosecutor argued that to consider mercy was contrary to the law (Tr. 2931) and was backed up by the court’s instruction that the jurors could show no sympathy. The issue was raised in the post trial motion (C. 381 ¶ 22) and on appeal to the Illinois Supreme Court, which failed to address Sanchez’ contention that the trial court’s refusal to give the “mercy” instruction denied him his Fourteenth Amendment right to due process. (Appendix A at 17)

Sanchez contended in the trial court and in the Illinois Supreme Court that the Illinois death penalty statute is unconstitutional in that it leaves the risk of non-persuasion, at the aggravation/mitigation phase, on the defendant. The trial court rejected the contention (Tr. 2837-2841) and so did the Illinois Supreme Court. (Appendix A at 17)

REASONS FOR GRANTING THE WRIT

I.

THE PROSECUTOR'S MISCONDUCT IN CROSS-EXAMINING THE DEFENDANT DURING THE SENTENCING PHASE CONCERNING SPECULATION ABOUT THE BRUTALITY OF THE OFFENSE AND INSTRUCTING THE DEFENDANT TO "TELL THE JURY WHAT MITIGATING FACTORS WOULD CAUSE A JURY TO NOT OPPOSE [SIC] THE DEATH PENALTY ON FACTS SUCH AS THIS" VIOLATED THE EIGHTH AMENDMENT AND DUE PROCESS BY (1) INTRODUCING IRRELEVANT AND UNRELIABLE FACTORS IN DETERMINING THE APPROPRIATENESS OF THE DEATH SENTENCE, (2) MINIMIZING THE JURY'S SENSE OF ITS OWN RESPONSIBILITY FOR IMPOSING THE DEATH SENTENCE, AND (3) CREATING THE DANGER THAT THE JURY CONCLUDED THAT THE BURDEN OF PERSUASION WAS ON THE DEFENDANT TO SHOW THAT HIS LIFE SHOULD BE SPARED. IN ADDITION, THIS MISCONDUCT VIOLATED THE SIXTH AMENDMENT BECAUSE IT DILUTED THE DEFENDANT'S RIGHT TO HAVE COUNSEL PRESENT THE ARGUMENT IN MITIGATION.

All members of the Illinois Supreme Court agreed that the prosecutor's cross-examination was "possibly overzealous" and "admittedly gives us pause." (Appendix A at 28, 26) Three members of the court found the prosecutor's tactics "outrageous" (Appendix A at 36), and Justice Goldenhersh stated:

(I)t is the most flagrant example of improper, prejudicial cross-examination to come before this court in the many cases involving death penalties.

(Appendix A at 35) The majority considered it error but harmless under a *Chapman v. California*, 386 U.S. 18 (1967) analysis. (Appendix A at 28)

The prosecutor's conduct violated due process, the Eighth Amendment, and the Sixth Amendment because it introduced the unreliable and irrelevant opinion testimony of the defendant, sought to minimize the jury's sense of its own responsibility for determining the appropriateness of the death sentence, created the utterly inaccurate and improper impression that the burden of persuasion rested upon the petitioner to provide reasons why his life should be spared, and diluted the role of counsel in marshalling the facts and arguing those facts in mitigation.

Because the penalty of death is qualitatively different from a sentence of imprisonment, however long, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305, 49 L.Ed.2d 944, 961, 96 S.Ct. 2978 (1976), cited in *Zant v. Stephens*, 462 U.S. 862, 884-885, 77 L.Ed.2d 235, 255, 103 S.Ct. 2733 (1983). In its quest to assure reliability, the Illinois Supreme Court has specifically held that the opinions of witnesses about the ultimate issue of whether the defendant should be sentenced to death are wholly without value to the trier of fact. In *People v. Stewart*, 105 Ill.2d 22, 473 N.E.2d 840 (1984), it was the defendant who sought to introduce the testimony of two sisters and a friend of the family that they did not believe he should be put to death. The Illinois Supreme Court found such opinion testimony unreliable and irrelevant to any question the jury was to decide at the sentencing phase. 473 N.E.2d at 862-863.

The instant case presents the far more egregious situation of demanding opinion testimony from Sanchez himself about whether he should live or die. Aside from the inherent unreliability of such testimony cited in the *Stewart* opinion, the prosecutor's cross-examination exacerbated

the chances of an erroneous sentencing determination by diminishing the jury's sense of its own awesome responsibility as the sentencer and by conveying the clear suggestion that the burden of persuasion at the final sentencing phase was upon Sanchez himself.

In *Caldwell v. Mississippi*, 472 U.S. ___, 86 L.Ed.2d 231, 105 S.Ct. ___ (1985), this Court condemned prosecutorial argument that the jury should not view itself as determining whether the defendant would die because the death sentence would be reviewed for correctness by the state Supreme Court. Your Honors pointed out that sentencer discretion is consistent with the Eighth Amendment's heightened need for reliability only because it is assumed that those sentencers will treat their power to determine the appropriateness of death as an awesome responsibility. State-induced suggestions that the sentencing jury may shift its sense of responsibility to the appellate court presents the spectre of a death sentence based upon a factor wholly irrelevant to legitimate sentencing concerns and an "intolerable danger that the jury will in fact choose to minimize the importance of its role." 86 L.Ed.2d at 242. The decision of a jury whose sense of responsibility for determining the appropriateness of the death sentence has been minimized by the State does not comport with the standard of reliability required by the Eighth Amendment. 86 L.Ed.2d at 247.

In the instant case, the jury was led to believe that the responsibility for determining the appropriateness of the death penalty, or for refuting its appropriateness, properly lay with the petitioner. If the defendant himself cannot think of a reason why he should live, a reasonable juror could hardly be expected to substitute his or her judgment. The prosecutor's misconduct in leading the jury in this case to believe that the responsibility for deter-

mining the appropriateness of the defendant's death rested upon the petitioner himself was no less violative than the suggestion in *Caldwell* that the ultimate responsibility lay with the reviewing court.

Finally, the reliability of the sentencing decision in the instant case was further undermined by the manner in which the prosecutor's cross-examination permitted the jury to believe that the burden of persuasion was upon the petitioner. The Illinois sentencing scheme in capital cases refrains from placing any burden on either the State or the defendant at the final hearing in aggravation and mitigation. *Ill. Rev. Stat.*, 1983, Ch. 38, Sec. 9-1(e). Yet any reasonable juror would be led to believe by the prosecutor's final demand that the defendant "[t]ell the jury what mitigating factors would cause a jury to not oppose [sic] the death penalty on facts such as this" that the petitioner was the party who bore the burden of persuading the jury that his life should be spared.

In *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975), this Court held that the effect of burden-shifting at the trial phase is to increase the likelihood of an erroneous conviction. Due process principles cannot tolerate increasing the margin of error in this fashion. 421 U.S. at 697-698, 44 L.Ed.2d at 520-521. *Mullaney* was followed in *Sandstrom v. Montana*, 442 U.S. 510, 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979), striking down a jury instruction which had the effect of shifting the burden of persuasion as to the element of intent. This Court held in *Sandstrom* that the mere possibility that the jury may have interpreted the instruction as one shifting the burden to the defense rendered the instruction violative of due process.

Finally, the prosecutor's cross-examination unconstitutionally diluted the defendant's Sixth Amendment right

to counsel. As this Court has held, the right to be heard would be of little avail if it did not comprehend the right to be heard by counsel. Because the defendant lacks the skill and knowledge adequately to prepare a defense, he requires the guiding hand of counsel at every step in the proceeding against him. *Gideon v. Wainwright*, 372 U.S. 335, 345, 9 L.Ed.2d 799, 805, 83 S.Ct. 792 (1963), citing *Powell v. Alabama*, 287 U.S. 45, 68, 69, 77 L.Ed. 158, 53 S.Ct. 55 (1932). No aspect of persuasion is more important than the opportunity for counsel—not the defendant—to marshal the evidence, to sharpen and clarify the issues, to argue the defendant's version and assail the State's position, and to argue the defendant's case to the jury. *Herring v. New York*, 422 U.S. 853, 45 L.Ed.2d 593, 95 S.Ct. 2550 (1975). In this case, the prosecutor asked petitioner to argue his own case in mitigation. At this point, the role of counsel shriveled to the helpless dilemma of either objection, giving the jury the impression that the petitioner was incapable of answering the question without prejudicing his cause, or not objecting and watching petitioner tell the jury that he cannot think of a reason why he should live. To place both the petitioner and his counsel in such an untenable position was to dilute and diminish the effectiveness of counsel in violation of the Sixth Amendment.

The prosecutor's improper cross-examination of Hector Sanchez violated Eighth Amendment and due process requirements of heightened reliability at the final sentencing phase of a capital case because it injected the utterly irrelevant and extraneous factor of the defendant's own opinion, minimized the jury's sense of its own responsibility for imposing the death sentence, and suggested that the burden of persuasion was on the defendant to show that his life should be spared. In addition, the prosecutor's

demand that the defendant argue his own case in mitigation diluted the role and effectiveness of counsel in violation of the Sixth Amendment.

For these reasons, Hector Sanchez respectfully requests this Court to grant certiorari in his case.

II.

THE PETITIONER'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED BY THE ILLINOIS SUPREME COURT'S APPLICATION OF A "HARMLESS ERROR" ANALYSIS TO THE PROSECUTOR'S FLAGRANTLY IMPROPER CONDUCT AT THE DEATH PENALTY HEARING.

Because the need for reliability is the greatest in a death case, this Court has set an exacting standard of accuracy under the Eighth and Fourteenth Amendments. *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed. 2d 393 (1977). The purpose of the Eighth Amendment is to make sure that a State's power to impose the ultimate penalty is confined to civilized standards. *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

If the following question is within the limits of civilized standards, then one must wonder where, if anywhere at all, those limits might be:

Q. Tell the jury, sir, what mitigating factors would cause a jury to not oppose [sic] the death penalty on facts such as this? (Appendix A at 28)

The Illinois Supreme Court's application of the harmless error analysis of *Chapman v. California*, 386 U.S. 18, 25-26, 17 L.Ed.2d 705 (1967), to this virulently malignant misconduct is completely inconsistent with this Court's pronouncements. The Illinois Supreme Court held that, "[W]e

view the aggravating factors as clearly sufficient to support the sentence the jury imposed." (Appendix A at 29) But there was significant evidence of mitigating factors, as well. Under Illinois death penalty procedure, the aggravation-mitigation phase presupposes a finding of sufficient aggravating factors to make the defendant eligible for the death penalty. Thus, an aggravation and mitigation hearing cannot occur under Illinois death penalty procedure without a prior finding of an aggravating factor sufficient to support the imposition of the death penalty. *People v. Owens*, 102 Ill.2d 88, at 114, 464 N.E.2d 261 (1984). The Eighth and Fourteenth Amendments require the jury to consider all mitigating factors, as well. *Woodson v. North Carolina*, *supra*; *Lockett v. Ohio*, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 1978 (1978). But the holding of the Illinois Supreme Court effectively eviscerates the importance of mitigating factors, significant evidence of which was presented in this case, in the weighing process of an aggravation and mitigation determination.

Accordingly, petitioner respectfully requests the Court to grant certiorari.

III.

THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY AT THE PENALTY PHASE THAT IT COULD EXTEND MERCY TO PETITIONER VIOLATED ESTABLISHED PRINCIPLES OF DUE PROCESS OF LAW AND THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

This Court has firmly established that at the penalty phase of a capital case the Eighth and Fourteenth Amendments require the jury to consider all mitigating factors

presented on behalf of the defendant. *Woodson v. North Carolina*, 428 U.S. 304, 49 L.Ed.2d 944, 96 S.Ct. 2978 (1976); *Lockett v. Ohio*, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978). The trial court's refusal in the case at bar to instruct the jurors that they could extend mercy to petitioner, taken in conjunction with the trial court's instruction that they should not be influenced by "sympathy" invited them to disregard mitigating evidence and thus violated petitioner's right to due process of law and the prohibition against cruel and unusual punishment. *Lockett, supra*.

Petitioner tendered an instruction which stated:

In considering the death penalty, you may, if you choose to do so, consider whether or not you wish to extend mercy to the defendant.

(Defendant's Instruction No. 3, C. 364) (Tr. 2643) This instruction was refused. In so ruling, the trial court stated: "I don't think sympathy is a factor the jury should consider at all." (Tr. 2852) The jury was instructed at the conclusion of the final death penalty hearing that:

. . . Neither sympathy nor prejudice should influence you. You should not be influenced by any person's race, color, religion, or national ancestry. (C. 373)

And this instruction came after the prosecutor argued that to consider mercy was contrary to the law. (Tr. 2931)

In *Lockett v. Ohio, supra*, in striking down a law that only permitted consideration of three statutorily defined mitigating factors, this Court concluded that the Eighth and Fourteenth Amendments required that the sentencer in a capital case not be precluded from considering any aspect regarding the defendant's background or circum-

stances of the offense offered by the defense as the basis for a penalty other than death. 438 U.S. at 604. Earlier in striking down a mandatory death penalty law in *Woodson*, *supra*, this Court condemned a process that excluded from consideration in imposing the ultimate penalty the possibility of "compassionate or mitigating factors." 438 U.S. at 604. These holdings and others* have established the requirement that there be a focus on the individual as well as the crime in determining whether to impose a sentence of death. The direct connection between motions of sympathy and mercy for the capital defendant and the mitigating factors which engender such attitudes, made it clear that a court which instructs a jury not to consider sympathy is in effect directing the jury not to consider mitigating factors. This Court's rulings prohibit such a procedure.

This Court's recent ruling in *California v. Brown*, ____ U.S. ____, 93 L.Ed.2d 934 (1987), mandates that jurors may only disregard sympathy that is "totally divorced from the evidence adduced during the penalty phase." 93 L.Ed.2d at 940. There the jury was instructed that they "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" during the penalty phase of a capital trial. 93 L.Ed.2d at 938.

Because the jury was instructed to disregard "mere sympathy" and because sympathy was but one of several listed factors that could improperly influence a jury, this

* See *Eddings v. Oklahoma*, 455 U.S. 104, 71 L.Ed.2d 1, 102 S.Ct. 869 (1982); *Roberts v. Louisiana*, 428 U.S. 325, 49 L.Ed.2d 974, 96 S.Ct. 3001 (1976); *Skipper v. South Carolina*, 476 U.S. ____, 90 L.Ed.2d 1, 106 S.Ct. ____ (1986).

Court interpreted the California instruction as an admonition only to ignore those emotional responses not based upon evidence introduced in aggravation and mitigation at the capital trial.

However, the Illinois instruction at issue here is not subject to such a narrow interpretation. There is no restriction that the jury disregard only "mere sympathy." While the instruction does admonish jurors not to be influenced by such obviously improper factors as race, color, or religion, the warning against sympathy is contained in a separate part of the instruction. Thus, it is not clear that the Illinois instruction only warns the jury to disregard sympathy not based on the evidence.

When taken in conjunction with the prosecution's argument that mercy was contrary to the law, the jury could reasonably have interpreted the instruction and argument to mean that they should disregard mercy and sympathy resulting from evidence produced at the capital trial. The danger presented by instructions such as the Illinois instruction at issue was highlighted by Justice O'Connor's concurring opinion in *California v. Brown*:

As the dissent illustrates, however, one difficulty with attempts to remove emotion from capital sentencing through instructions such as those at issue in this case is that juries may be misled into believing that mitigating evidence about a defendant's background or character must also be ignored. 93 L.Ed.2d at 942.

An instruction which produces such a result, as does the Illinois instruction at issue, is prohibited by *Woodson*, *Lockett*, and their progeny.

Furthermore, the trial court's actions, as affirmed by the Illinois Supreme Court, will lead to the arbitrary and capricious imposition of the death penalty, the result con-

demned in *Freeman v. Georgia*, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972). While the Illinois Supreme Court sanctioned here the refusal of petitioner's "mercy" instruction and the giving of the "no sympathy" instruction, it has implicitly approved arguments for mercy on a capital defendant's behalf in the instant case and several others. *People v. Eddmonds*, 101 Ill.2d 44, 461 N.E.2d 347 (1984); *People v. Gacy*, 103 Ill.2d 1, 468 N.E.2d 1171 (1984); *People v. Stewart*, 104 Ill.2d 463, 473 N.E.2d 1227 (1984). Indeed, mercy, as a proper sentencing consideration, is as old as the common law.

However, some juries may accept defense counsel's invitation to consider mercy while others will feel bound by the court's instruction not to be influenced by sympathy. Such a situation is not only confusing, it is constitutionally impermissible. The jury is left without the required informed guidance, *Gregg v. Georgia*, 428 U.S. 153 (1976), in reconciling defense counsel's pleas for mercy with the command of a court's instructions not to be influenced by sympathy. Some juries may accept defense counsel's invitation, others may feel precluded from so doing by the instruction. In the absence of any standard to guide the jury as to what route to follow, the imposition of the death penalty under the procedure employed here will return to the freakishness condemned by *Freeman*, *supra*.

Accordingly, the petitioner respectfully requests this Court to grant certiorari.

IV.

THE ILLINOIS DEATH PENALTY STATUTE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BECAUSE IT PLACES THE RISK OF NONPERSUASION ON THE ACCUSED.

The decision whether to sentence the defendant to death in Illinois depends on whether the factfinder concludes that there are "mitigating factors sufficient to preclude the imposition of the death sentence. . . ." *Ill. Rev. Stat.*, 1983, Ch. 38, Sec. 9-1(g) and (h). This standard, which applies at both jury and bench sentencings, places the risk of nonpersuasion on the defendant. Since the aggravating factors necessary to make the defendant eligible for the death penalty also create a presumption in favor of death, a defendant's failure to present any mitigation or to persuade the sentencer that mitigation is sufficient results in the mandatory imposition of the death penalty. The prosecutor does not have to demonstrate that mitigation is insufficient or, if no mitigation is tendered, that the death penalty is appropriate. Any doubt that this is so was resolved by the Illinois Supreme Court in the case of *People v. Owens*, 102 Ill.2d 88, 464 N.E.2d 261 (1984), which held:

When there is no mitigating factor for the court to weigh against an aggravating factor that has been found to exist beyond a reasonable doubt, the statute obligates the judge to impose the death sentence. . . .

102 Ill.2d at 114.

Allocating the risk of nonpersuasion to the defendant in this manner violates the Eighth and Fourteenth Amendments. The qualitative difference between the death penalty and any other sentence requires a heightened degree of reliability in the sentencing determination and renders

any avoidable error in the imposition of the death penalty intolerable. *Woodson v. North Carolina*, 428 U.S. 280, 305, 49 L.Ed.2d 944, 961, 96 S.Ct. 2978 (1976); *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). The need for reliability under the Eighth Amendment and avoidance of error under the Fourteenth Amendment requires that the prosecution and not the accused bear the risk of nonpersuasion with respect to the ultimate balance of aggravation and mitigation.

The need for this Court's review of this issue was recently noted by Justice Marshall in his opinion dissenting from the denial of certiorari in *Stebbing v. Maryland*, 469 U.S. 900, 83 L.Ed.2d 212, 105 S.Ct. 276 (1984). Analyzing a standard like that in Illinois, in which the focus is on whether mitigating factors outweigh the aggravating factors rather than vice versa, Justice Marshall stated:

This language inevitably would lead a sentencing body to believe that the burden of proof rests on the defendant—who must prove mitigating factors—to prove that mitigating factors outweigh aggravating ones. This is especially so in that the statute is silent as to which party bears the burden of proof on this point. As a result, the criminal defendant faces a mandatory death sentence if he is unable to prove that the mitigating circumstances that he has been able to prove outweigh the aggravating factors previously found. This burden places the risk of error squarely on the defendant's shoulders, and on the side of execution. I had not understood the Constitution to permit the State to transfer such an excruciating burden to a defendant.

83 L.Ed.2d at 217. The instant case squarely presents the issue set forth by Justice Marshall, and the petitioner accordingly respectfully urges that this Court grant certiorari.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois.

Respectfully submitted,

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March 31, 1987





APPENDIX A

Docket Nos. 61239, 63683 cons.—Agenda 3—September 1986

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee,
v. HECTOR REUBEN SANCHEZ, Appellant.

JUSTICE RYAN delivered the opinion of the court:

Hector Reuben Sanchez, along with a codefendant, Warren Peters, Jr., was charged under an indictment with two counts of murder (Ill. Rev. Stat. 1983, ch. 38, par. 9-1(a)(1)(3)), aggravated kidnaping (Ill. Rev. Stat. 1983, ch. 38, par. 10-1(a)(1)), rape (Ill. Rev. Stat. 1983, ch. 38, par. 11-1(a)), deviate sexual assault (Ill. Rev. Stat. 1983, ch. 38, par. 11-3(a)), and attempted murder (Ill. Rev. Stat. 1983, ch. 38, par. 8-4(a)). The charges stemmed from the abduction and slaying of Michelle Thompson on February 3 and 4, 1984. Rene Valentine, an acquaintance of Ms. Thompson, was shot and wounded during the incident. Peters' case was severed, and he was tried and convicted of murder on July 14, 1984.

Sanchez, who was tried later, was found guilty of all charges by a jury in the circuit court of Lake County. He waived a jury as to the first phase in his sentencing hearing, and the trial judge found the existence of statutory aggravation factors. (Ill. Rev. Stat. 1983, ch. 38, par. 9-1(b)(6).) The jury then determined that there were no mitigating factors sufficient to preclude imposition of the death penalty, and the defendant was sentenced to death. He was also given concurrent terms of 60 years for the other offenses. The sentence was stayed (87 Ill. 2d R. 609(a)) pending direct appeal to this court (Ill. Const. 1970, art. VI, sec. 4(b); 87 Ill. 2d R. 603).

Subsequently, Sanchez sought relief under section 2-1401 of the Code of Civil Procedure (Ill. Rev. Stat. 1983, ch. 110, par. 2-1401). His petition was dismissed without an evidentiary hearing. An appeal from that dismissal was

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taken to the appellate court, and we granted a transfer of the appeal to this court under Rule 302(b) (87 Ill. 2d R. 302(b)). That appeal has been consolidated with his direct appeal, and both cases are now before this court.

Rene Valentine testified that on the evening of February 3, 1984, he went to a nightclub known as D. Laney's in Gurnee, Illinois. While there, he met the deceased, Michelle Thompson. Valentine knew her because she was dating Pablo Martinez, with whom Valentine was then living. At about 12:30 a.m., Valentine and Thompson went out to Valentine's car in the parking lot. Two men approached the car and entered it from opposite sides. One, a black man, grabbed Thompson, while the other, a Puerto Rican, produced a gun. Thompson was taken into another vehicle by the black man. The Puerto Rican escorted Valentine at gunpoint to a more secluded area of the parking lot and shot him twice in the chest but did not kill him. Valentine later identified the assailant as the defendant, Hector Reuben Sanchez.

Warren Peters, Jr., the black man in Valentine's narrative, provided the bulk of the evidence against Sanchez. He had been tried and convicted of the murder of Thompson before Sanchez' trial but was not sentenced until after he testified for the State against Sanchez. He testified that on February 3, Peters, Sanchez and another person named Forest Heinz had been planning to burglarize a restaurant in the vicinity of D. Laney's. They had "cased" the restaurant earlier in the evening, and later Sanchez and Peters returned to D. Laney's. They were sitting in Peters' car in the parking lot when they spotted Valentine and Thompson. Sanchez proposed going over and talking to them. Peters did not know that Sanchez had a gun, or what Sanchez' intentions were.

Sanchez instructed Peters to take the woman to his car, while Sanchez went off with Valentine. Within seconds, Peters heard what sounded like a gunshot. Sanchez returned to Peters' car, produced a pair of handcuffs from his coat and put them on Thompson. They then proceeded to Sanchez' home. Sanchez took Thompson into the house.

By the time Peters entered, Thompson was nude from the waist down. Sanchez then raped her on the family-room floor. He then produced a nylon strap, tied Thompson's still-handcuffed wrists to her feet and dragged her behind a chair. The two men then went outside to put Peters' car in the garage. When they returned, they discovered that Thompson had escaped.

Peters and Sanchez went outside to search and found that she was in the back yard of the house next door. She was near the back door, and was screaming "Help me." According to Peters, Sanchez went over and dragged her back by the handcuffs. Sanchez then told Peters he would have to go back and "blow the neighbors' heads off" because the girl had been pounding on the door and had probably been seen. Sanchez took a gun from the kitchen and went out. He returned a few minutes later, saying he had explained the disturbance.

Sanchez then carried Thompson to the basement. Peters went down several minutes later. He observed the still half-nude woman leaning over the washing machine with Sanchez behind her. She had been gagged with a strip of cloth. Sanchez asked Peters if he "wanted any" and, when Peters declined, announced that he would "have to kill her." Sanchez strangled her with a nylon strap. He also wrapped a coat hanger around her neck, slammed her head to the floor and kicked the lifeless body in the side.

Peters also testified that when the two men began to move the body, he noticed that she had defecated on the basement floor. Peters went for some tissue, and Sanchez cleaned up the excrement. They then dragged the body upstairs. Sanchez burned Thompson's clothes and jewelry in the fireplace. The body was placed in the backseat of Sanchez' car. The men drove to an isolated location in Wisconsin and disposed of the body. As Sanchez drove away, he ran over the body.

After returning to Sanchez' house, Peters took Sanchez' car to his home and kept it for several days, leaving his

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own car in Sanchez' garage. When Peters' car was returned to him, the formerly white top had been painted black.

Gene Gonyo, Sanchez' neighbor, also testified. He said that he was awakened by his dog barking at about 1:30 a.m., February 4. He saw a man and a woman near his back door. The woman was nude from the waist down and the man was wearing a green jacket. Gonyo heard a scream and heard the woman say the word "Larry," which was the nickname by which Sanchez was known to Gonyo. He did not hear cries of "Help me" at any time. Gonyo watched the pair move to the front of his house and walk in the direction of Sanchez'. The woman was walking behind Sanchez. She did not appear to be wearing handcuffs. Gonyo thought to call the police, but was interrupted by a knock at the door. It was Sanchez, who apologized for the disturbance and explained "she either had an epileptic seizure, or she was on drugs, or she was on booze." Sanchez did not have a gun, but as he left he turned and picked up something "dark." Gonyo could not tell what the object was. In Gonyo's estimation, only a few seconds elapsed between the time he saw Sanchez and the girl, and the time when Sanchez was at his front door. There would not have been enough time for Sanchez to have returned to his house, have a conversation, locate a gun and return.

At about 2:15 a.m., Gonyo was again awakened by the barking dog. He saw a car he recognized as Sanchez' pull out of the driveway with the headlights off. The car paused at the corner, then turned toward Wisconsin.

The balance of the prosecution's evidence was of a forensic or otherwise scientific nature. Briefly summarized, the doctor who performed the autopsy testified that the cause of death was strangulation with a fairly wide ligature. Other bruises and abrasions were found which were consistent with events as described by Peters. There was also evidence of anal penetration.

However, the examination found no trace of excrement. Neither was there evidence of injury to the genitalia, as is commonly found in rape victims. Swabs were taken from all the victim's cavities, but only the vaginal area showed the presence of semen. Later testimony established that chemical factors in the semen were consistent with Sanchez' blood type.

Another witness was an FBI microscopic analysis expert. His investigation involved comparisons of hairs, fibers and other materials collected from the victim's body and the scene of the crime. Briefly stated, fibers found on the body were consistent with fibers from a number of sources in Sanchez' house and car. Also, the victim's hair was consistent with hair found in Sanchez' house and car, Peters' car and on Gonyo's property. Finally, buttons and fibers consistent with the victim's clothing were found in Sanchez' house.

An FBI paint expert also testified that the paint which had been used on the top of Peters' car was consistent with paint in cans found in Sanchez' garage. Other witnesses testified that they had seen handguns and handcuffs in Sanchez' possession.

For the defense, a witness testified that both Sanchez and Valentine applied for jobs with her company on the same day. Valentine had denied knowing Sanchez. A woman who worked as a bartender testified that a man who appeared to be Sanchez was in her saloon on the night of February 3. A patron of the bar identified Sanchez as having been there but was uncertain of the date.

The proprietor of D. Laney's testified that he had seen Valentine go in and out of the bar's inner door several times during the night. From his vantage point, he could not say whether Valentine went outside each time, only that he at least went to the vestibule area. He also did not see Sanchez at D. Laney's on February 3. A D. Laney's bartender testified that drugs were commonly trafficked there. The common method was for dealers to "take orders" at the bar, go to their cars for the merchandise and return.

Pablo Martinez testified that he was in love with Michelle Thompson. Martinez, who was underage, had been to D. Laney's in the past because Valentine knew the doorman. On the night of Thompson's slaying he had spoken with Valentine but had been told he would not be able to get in that night. He had also received a call from Thompson during the evening. He denied any feelings of jealousy because Thompson and Valentine were at D. Laney's together.

Based upon these facts, the jury returned a verdict of guilty on all counts. The death penalty hearing was set to commence the next day. Upon reconvening, the court announced that Sanchez had attempted suicide during the night by breaking his eyeglass lens and attempting to cut his arm. Defense counsel, asserting that Sanchez was distraught and unable to cooperate, moved to discharge the jury and postpone the sentencing hearing. The court determined that Sanchez, who had received medical attention and was present, was fit to proceed and denied the motion.

The defendant waived a jury determination of whether aggravating factors were present. The court then found as an aggravating factor that Thompson had been killed in the course of another felony and that Sanchez had actually performed the acts causing her death.

The jury then reconvened and heard testimony for the second phase of the death penalty hearing. The focus of the State's evidence in aggravation was on the previously unsolved murder of Sharon Egerer in Milwaukee in May 1975. Francisco Morales, a former business partner and acquaintance of Sanchez, testified that Sanchez had been involved in a relationship with Egerer from about 1970 or 1971. In May of 1975 Morales learned that Egerer had initiated a paternity action against Sanchez. Sanchez attempted to enlist Morales to testify on his behalf.

William Garris testified that he participated in Egerer killing. He and Sanchez went to Milwaukee on a Friday in May of 1975. They met Egerer after she left work and

followed her to her apartment. Sanchez went inside with her and sometime later summoned Garris. Garris saw Egerer's body lying in a pool of blood. Sanchez admitted killing her, and threatened to kill Garris if he did not provide an alibi.

The next witness was Suzi Holton Eckerle. She testified that when Garris and Sanchez returned to her house on May 30, 1975, Sanchez told her he had "taken care of Sharon." He demanded that she too provide him with an alibi. When the police investigated the Egerer slaying, Sanchez, Garris and Eckerle claimed that they had been at Eckerle's house the entire evening of the incident. Shortly after the Egerer crime, Sanchez and Eckerle became intimate and carried on a relationship until 1981. It ended in a dispute over another woman. When news of Sanchez' involvement in the Thompson homicide came out, Garris and Eckerle came forward.

Sanchez, who did not testify at his trial, did take the stand at the sentencing hearing. He has never learned to read and write. Nonetheless, he managed to keep a job at Johnson Motors for 14 years and, through thrift, saved enough money to purchase land and build the house in which he lived.

Sanchez testified about the Egerer homicide. He claims that when Garris was told of the paternity suit, he proposed going to Milwaukee and talking the Egerer. When they located her, she refused to talk to Sanchez, but agreed to speak with Garris. It was Garris who went into Egerer's apartment while Sanchez waited outside. When Garris came out he was covered with blood. He told Sanchez he had killed Egerer because she intended to extort money from Sanchez. Garris, knowing that Sanchez had saved a bit of money, hoped to earn Sanchez' favor.

When they returned to Eckerle's house, Garris told her that Sanchez had committed the crime. Over the years, Eckerle refused to let Sanchez explain. Sanchez had never come forward because he realized that, due to the pater-

nity-suit motive, he would be suspected of having committed the murder.

Sanchez also testified that Forest Heinz and Peters had committed a number of burglaries. Sanchez denied involvement but stated that he occasionally let Heinz and Peters borrow tools. He also admitted having had an affair with Heinz' wife but had terminated it when he met Heinz. He stated that on February 3, 1984, Heinz and Peters were planning to burglarize a restaurant near D. Laney's. They kept their equipment and masks at Sanchez' house and had access to the house because they knew where Sanchez kept a spare key. Sanchez had been invited to participate but declined. He did not want to be around when Heinz and Peters came for their burglary tools.

Sanchez stated that on the night of February 3 he went to several bars in Wisconsin and Lake County. He eventually met a woman who returned to his house with him. After a time, Heinz walked in and sat down. Sometime later, when Sanchez was out of the room, the woman disappeared. Sanchez noticed her shoes and pants near the open patio door. He followed her tracks in the snow to Gonyo's back yard and brought her back to his house. He then went over and apologized to Gonyo.

When he returned, Heinz was still there. A short while later the woman left and, with Heinz still present, Sanchez fell asleep on the sofa. In the morning Sanchez discovered that Peters' car was in the garage and his own car was missing. The next day, Heinz came over with several cans of black paint, and he and Sanchez painted the top of Peters' car. Sanchez later spoke with Peters, who explained that he had left his car at Sanchez' because it had been in a hit-and-run accident. Sanchez saw no signs of damage. Sanchez cleaned out the back seat and trunk of Peters' car and returned it to him. Sanchez concluded his testimony by denying any involvement in the Thompson slaying.

Based upon this testimony, the jury decided to impose the death penalty.

The defendant's initial contention is that the evidence was insufficient to prove him guilty beyond a reasonable doubt. He argues that Peters' testimony is subject to serious question, especially in light of the fact that he testified prior to his own sentencing and believed he might escape the death penalty by cooperating in the case against Sanchez. Defendant also notes that Mr. Gonyo heard no screams of "Help me," but rather heard the woman at his back door call the defendant by his nickname, "Larry." He argues that the sequence of events described by Peters would not lead to social introduction, which would have been the only way Thompson could have learned that he was called "Larry." Also, Mr. Gonyo did not see the woman being dragged back to Sanchez' house in handcuffs; rather, she followed some distance behind Sanchez and was walking normally.

Defendant also contends that the activities of Forest Heinz on the evening of February 3 create questions. He alleges that Peters changed his story several times in order to protect Heinz. At his subsequent sentencing hearing, Peters admitted that he lied at Sanchez' trial to help the State. In addition, the defendant points to the testimony of the witnesses who tentatively placed him in a saloon in Wisconsin at 8:30 on February 3. If he was there, he could not have been with Peters in Gurnee as Peters testified. Moreover, the defendant asserts that the activities of Rene Valentine create doubts as to his credibility. His behavior fits the pattern employed by persons selling drugs at D. Laney's. He was also carrying an unusually large amount of cash for a person who was unemployed. Finally, the defendant challenges the scientific evidence. He notes that fiber and hair comparisons can never be conclusive and also points out that Peters' description of Thompson's involuntary defecation was belied by the absence of fecal matter on her body or on the basement floor.

The thrust of defendant's sufficiency argument is that his convictions rested in large part on Peters' testimony, and that the totality of the evidence creates so many in-

consistencies in Peters' story that the resulting conviction cannot stand.

The scope of our review of the sufficiency of the evidence to support a conviction is limited by principles which are by now well established. A conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of guilt. (*People v. Collins* (1985), 106 Ill. 2d 237, 261; *People v. Vriner* (1978), 74 Ill. 2d 329, 342.) In assessing sufficiency, it is not the function of this court to retry the defendant. (*People v. Collins* (1985), 106 Ill. 2d 237, 261.) The relevant inquiry is "whether, after [re]viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 61 L. Ed. 2d 560, 573, 99 S. Ct. 2781, 2789; *People v. Collins* (1985), 106 Ill. 2d 237, 261.

With regard to Peters' testimony in particular, we have acknowledged that the testimony of an accomplice is to be viewed with suspicion (*People v. Collins* (1985), 106 Ill. 2d 237, 261; *People v. Baynes* (1981), 88 Ill. 2d 225, 232), but we have repeatedly held that it may be sufficient to sustain a conviction if it satisfies the jury of guilt beyond a reasonable doubt. (*People v. Collins* (1985), 106 Ill. 2d 237, 261; *People v. Farnsley* (1973), 53 Ill. 2d 537, 544-45.) It is the role of the fact finder to weigh all the evidence. That role is preserved by the "legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution." (Emphasis in original.) *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 61 L. Ed. 2d 560, 573, 99 S. Ct. 2781, 2789; *People v. Collins* (1985), 106 Ill. 2d 237, 261.

Applying these principles, we conclude that there is sufficient evidence to support the jury's verdict. Whatever conflicts may have existed in the evidence, resolution of such inconsistencies is wholly within the province of the jury. (*People v. Collins* (1985), 106 Ill. 2d 237, 262; *People*

v. Kubat (1983), 94 Ill. 2d 437, 468.) Moreover, the jury is also entrusted with determinations of credibility. (*People v. Collins* (1985), 106 Ill. 2d 237, 261-62; *People v. Ellis* (1978), 74 Ill. 2d 489, 496.) Here, the jury was fully aware of the circumstances underlying Peters' testimony, and the question of his believability was fully and capably argued by counsel. The jury chose to believe Peters, and we are not prepared to say that its conclusion was unsupported or unreasonable.

Defendant's next contention, related somewhat to the sufficiency issue, is that the trial court's refusal to reset Sanchez' trial to a date after Peters' sentencing hearing was prejudicial and a denial of due process. Defendant argues that Peters' was led (or at least permitted) to believe that he might be facing the death penalty. He would thus perceive the benefit to himself from cooperating in the case against Sanchez. He was thereby induced to testify more favorably to the prosecution than would otherwise be the case. He goes on to argue that the request for a continuance was reasonable and would not have prejudiced the prosecution's case.

The general rule is that the decision whether to grant a continuance is within the discretion of the trial court. (Ill. Rev. Stat. 1985, ch. 38, par. 114-4(e); *People v. Williams* (1982), 92 Ill. 2d 109, 116.) Neither of the parties has cited any case in which the issue here presented has been considered. Defendant cites a Federal *habeas corpus* decision, *Linton v. Perini* (6th Cir. 1981), 656 F.2d 207, in which the denial of a continuance was held to amount to a due process violation. However, in that case the denial unreasonably interfered with the defendant's right to effective assistance of counsel.

In contrast, the denial in the instant case does not implicate a specific constitutional guarantee. We also are not persuaded that the defendant was prejudiced in any other way by the denial. The jury was fully apprised of Peters' circumstances and the interest he had in testifying. Peters' conviction and pending sentencing were brought

out in both direct examination and cross-examination. Also, defense counsel vigorously stressed the point to the jury in closing argument. Thus, the jury was able to view Peters' testimony in the proper light and give it whatever weight and credence it thought it deserved.

The defendant's next contention is that he was denied a fair trial because the extensive pretrial publicity made it impossible to obtain an impartial jury. The defendant's motion to transfer venue or to bring in a jury from another county was denied.

The question of when pretrial publicity has reached a point which precludes obtaining an impartial local jury is a most vexing issue. This court has observed that "[c]rimes, especially heinous crimes, are of great public interest and are extensively reported. It is unreasonable to expect that individuals of average intelligence and at least average interest in their community would not have heard of any of the cases which they are called upon to judge in court. Total ignorance of the case is exceptional, and it is not required." (*People v. Taylor* (1984), 101 Ill. 2d 377, 386; *Irvin v. Dowd* (1961), 366 U.S. 717, 722-23, 6 L. Ed. 2d 751, 756, 81 S. Ct. 1639, 1642-43.) It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in open court. (*Irvin v. Dowd* (1961), 366 U.S. 717, 723, 6 L. Ed. 2d 751, 756, 81 S. Ct. 1639, 1643.) In assessing a claim of partiality due to pretrial publicity, a reviewing court has an obligation to evaluate the *voir dire* testimony of the jurors (366 U.S. 716, 723, 6 L. Ed. 2d 751, 756, 81 S. Ct. 1639, 1643; *People v. Taylor* (1984), 101 Ill. 2d 377, 390), and to review the entire record to determine independently whether the defendant received a fair trial (101 Ill. 2d 377, 391).

Based upon such a review, we conclude that the level of awareness of the case on the part of the venire and the jury ultimately selected was not so great as to establish partiality and to deny the defendant a fair trial. We are guided in our determination by *People v. Taylor* (1984), 101 Ill. 2d 377.

In *Taylor*, the defendant was granted a new trial because of extensive, prejudicial pretrial publicity. The manager of a Peoria radio station described the case as the most widely publicized case he had seen in Peoria. (*People v. Taylor* (1984), 101 Ill. 2d 377, 383.) The defendant conducted a survey which revealed that of 382 voters questioned, 378, or 98.9%, had heard of the case. Moreover, 72% of those polled thought the police had arrested the right person.

The problems presented by the sheer *amount* of publicity were compounded by the nature of what was reported. Much attention had been devoted to the fact that a co-defendant had been released after taking a polygraph examination, while the defendant's polygraph test was "inconclusive." (*People v. Taylor* (1984), 101 Ill. 2d 377, 383.) Such information would of course be inadmissible at trial. Despite exhaustion of all the defendant's peremptory challenges, six of the 12 jurors eventually impaneled had knowledge of the codefendant's release. 101 Ill. 2d 377, 391.

The defendant argues that, as in *Taylor*, the pool of persons from which his jury was drawn was exposed to extensive publicity regarding inadmissible, prejudicial matters. The media coverage of his case included reference to the Wisconsin murder of Sharon Egerer, and evidence of that offense could not be admitted in the prosecution's case in chief of the guilt phase of the trial. We are not persuaded, however, that the publicity rose to the extraordinary level that existed in *Taylor*.

As mentioned, the publicity in *Taylor* was described as "unprecedented" in intensity. While we accept that the coverage of the instant case was extensive, the record does not establish that it reached truly unprecedented proportions. As we stated in *Taylor*, the record must establish more than "the bare potential for bias." (*People v. Taylor* (1984), 101 Ill. 2d 377, 395.) Also, we note that the defendant did not exhaust his peremptory challenges, but rather had three remaining at the close of jury selection. This factor, while not conclusive, tends to belie a

claim of unfair prejudice. *People v. Madison* (1974), 56 Ill. 2d 476, 487.

The most basic fact distinguishing this case from *Taylor*, however, lies in a comparison of the juries that actually heard the evidence. In *Taylor*, fully half of the panel had detailed knowledge of the case, and were at least somewhat cognizant of inadmissible information. Here, the record indicates that only two of the eventual jurors had read of the crimes in the local newspaper, and neither had extensive recollection of what had been reported. Moreover, there was no indication that *any* of the jurors had an awareness of the Egerer slaying.

In sum, the review of the entire *voir dire* and record convinces us that the degree of publicity was typical for a case of this nature, and that awareness on the part of the venire was minimal and did not deny the defendant a fair trial.

The defendant next asserts that his jury was improperly biased in favor of the prosecution because of the exclusion of prospective jurors who expressed opposition to the possible imposition of the death penalty. He argues that so-called "*Witherspoon* excludables"—those jurors who admit to absolute scruples against the death penalty—should be allowed to participate in the guilt-innocence phase of a trial. Exclusion of such persons results in a jury which does not represent a fair cross-section of the community. Further, the defendant asserts that sociological studies have indicated that such "death-qualified" juries tend to be conviction prone, and thus deny defendants a fair trial.

Defendant relies primarily on *Grigsby v. Mabry* (8th Cir. 1985), 758 F.2d 226, in which the arguments he advances were accepted. Defendant concedes that this court had rejected the *Grigsby* reasoning on a number of occasions (e.g., *People v. Collins* (1985), 106 Ill. 2d 237, 278-79; *People v. Caballero* (1984), 102 Ill. 2d 23, 44-45) but nonetheless urges us to reconsider our position.

We decline the defendant's invitation, for the simple reason that *Grigsby* has recently been reversed by the

United States Supreme Court. (*Lockhart v. McCree* (1986), 476 U.S. ___, 90 L. Ed. 2d 137, 106 S. Ct. 1758.) The defendant has not presented, nor do we perceive independently, any State constitutional basis for departing from our prior cases and the now-consistent Supreme Court position on the issue.

Defendant's next contention is that he was denied a fair trial by certain tactics employed by the prosecution. Specifically, he complains that he was led to believe that Forest Heinz would be called as a witness because Heinz was included on the State's list of potential witnesses pursuant to Rule 412 (87 Ill. R. 2d 412). In anticipation of Heinz' testimony, the defendant chose not to object to testimony of Peters regarding other crimes in which Heinz and Sanchez allegedly participated. The State ultimately decided not to call Heinz. The defendant argues that he was "maneuvered" into permitting otherwise objectionable testimony to go before the jury and was then unable to counteract this testimony by cross-examination of Heinz. A motion for mistrial on this point was denied.

The denial of the motion was correct, for we do not find that Sanchez was prejudiced by these events. Initially, we note that the purpose of Rule 412 is to " 'prevent surprise and afford an opportunity to combat false testimony.' " (*People v. Raby* (1968), 40 Ill. 2d 392, 401.) However, there is no requirement that every witness listed must be called by the State. If there were, trials would be unduly protracted, and testimony would often be needlessly cumulative. The decision regarding which witnesses will actually be called is, and must be, a matter of trial strategy, subject to the up-to-the-minute assessments of counsel. Here, the prosecution apparently decided that Heinz' testimony would add little to their case and made the decision not to use it. Moreover, if Heinz' testimony was considered essential by the defendant, he, of course, was free to subpoena Heinz and to call him as a witness. Having failed to do so, the defendant is in no position to claim prejudice. See *People v. Nowak* (1970), 45 Ill. 2d 158, 168.

The defendant's next assertion is that certain photographic evidence was presented in a prejudicial manner. As part of the State's scientific evidence, the jury was shown highly magnified comparison photographs of microscopic fibers taken from the carpet in Sanchez' car and from the body of Thompson. The photographs were used in conjunction with expert testimony that the fibers were consistent. The defendant argues that the photographs amounted to two indistinguishable orange stripes that were presented in such a way as to cause the jury to give the comparison excessive weight. He characterizes the display as "posed," and thus unfairly prejudicial.

In support of his contentions, the defendant relies on two cases in which photographs were used to present evidence in an artificial manner. In *French v. City of Springfield* (1976), 65 Ill. 2d 74, the jury was permitted to view a film which recreated the plaintiff's version of an auto accident. The admission of the film was held to be error, because it tended to precondition the jury to accept plaintiff's version of the facts.

Similarly, in *People v. Crowe* (1945), 390 Ill. 294, the trial judge refused to admit photographs taken by the defendant sometime after the occurrence in question, which were intended to substantiate the defendant's testimony. In upholding the refusal to admit the photographs, this court stated that they were taken "not for the purpose of showing the physical facts as they actually existed at the time of the crime." 390 Ill. 294, 303.

French and *Crowe* are just not in point. As mentioned, the film in *French* was a recreation of events, produced and directed by the plaintiff. Likewise, the photographs in *Crowe* were also of an after-the-fact, posed nature. Neither of these exhibits even purported to depict any physical facts as they actually existed at the time of the occurrence in question.

Here, in contrast, the photographs are of actual items of physical evidence obtained from the crime scene. While it is true that the fibers in the photographs have been

magnified and presented to facilitate comparison, there is no suggestion that they have been misleadingly altered in any way. Without magnification, comparison would have been literally impossible, since the distinctive characteristics of such fibers are invisible to the unaided eye.

The defendant argues that the fiber expert chose only photographs which tended to show consistency between fibers, and thus caused the jury to overestimate the importance of the fiber comparisons. However, the expert testified in detail about fiber comparison. He acknowledged that such comparisons can at best lead to a conclusion that two fibers are consistent. The photographs were introduced to bolster his conclusion that *some* consistencies did in fact exist. He did not testify, nor did the photographs falsely suggest, that the fiber comparisons were identical and absolutely conclusive. In our view, the foundation surrounding the introduction of the photographs enabled the jury to properly consider their significance.

The next issue raised by the defendant, that the structure of the death penalty act places the burden of proof on the defendant and is therefore unconstitutional, has previously been considered and rejected by this court. (*People v. Albanese* (1984), 104 Ill. 2d 504; *People v. Williams* (1983), 97 Ill. 2d 252; *People v. Brownell* (1980), 79 Ill. 2d 508.) As we stated in those cases, the sentencing determination calls for a weighing process in which neither party bears a burden of proof. As we have stated, "while the precise weight to be given each aggravating and mitigating factor is not made a matter of numerical calculation, that is not a constitutional infirmity." (*People v. Brownell* (1980), 79 Ill. 2d 508, 534.) We are not persuaded to abandon our prior position.

The defendant next objects that at the sentencing phase the trial judge erred in refusing to tender a proposed jury instruction which stated:

"In considering the death penalty, you may, if you wish to do so, consider whether or not you wish to extend mercy to the defendant."

A similar argument was raised and rejected in *People v. Stewart* (1984), 104 Ill. 2d 463. There, the defendant sought an instruction at the death penalty stage which would have listed several nonstatutory mitigating factors. We upheld the trial judge's refusal to tender such an instruction on the basis that the jury was instructed that it could consider "any other facts or circumstances that provide reasons for imposing less than [the death penalty]," and the defense was permitted to present and argue any evidence he considered mitigating. (Illinois Pattern Jury Instruction, Criminal, No. 7A.15(7) (2d ed. 1971) (IPI Criminal 2d)); *People v. Stewart* (1984), 104 Ill. 2d 463, 492-93.

In our view this reasoning is equally applicable here. The defendant's non-IPI "mercy" instruction was refused, but the general "any other mitigating factor" instruction was given. Further, the defendant presented sympathetic testimony from members of his family, and counsel argued for mercy in his closing statement. Thus, the jury was in a position to consider mercy, or any other mitigating factor, as it saw fit. No error resulted from refusal of the instruction.

The defendant's next contention raises a novel challenge to Illinois death penalty sentencing procedure. It is by now familiar that a sentencing hearing is conducted, at which the jury weighs the factors in aggravation and mitigation in order to arrive at an appropriate sentence. The pertinent statute provides as follows:

"If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death." Ill. Rev. Stat. 1983, ch. 38, par. 9-1(g).

The defendant argues that this statutory procedure does not contemplate jury *deliberation* in the traditional sense. Counsel proposed at trial, and argues here, that each juror be given a separate verdict form on which to indicate his or her decision on the death penalty. If any such juror votes against the death penalty, there is no unanimity and

the death sentence is precluded. He argues that there is no reason to subject an antideath minority to the entreaties of the other jurors in order to arrive at a unanimous decision in favor of the death penalty.

We disagree, for the reason that the procedure urged by the defendant would be a drastic departure from classic concepts of jury functions. Had the legislature intended such a departure, we believe the language of the statute would have made that intention clear. Section 9-1 provides that the sentencing proceeding shall be held "before a jury," and that the jury must make a unanimous determination of whether mitigating factors exist. While the term "jury" is not defined in the Criminal Code of 1961, its meaning as a collective term is plain. Had the legislature not intended for the jury to reach a decision as a body, it could have referred to the decision making entity as "jurors."

The Supreme Court has stated:

"[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence * * * the number should probably be large enough to promote group deliberation * * *." (*Williams v. Florida* (1970), 399 U.S. 78, 100, 26 L. Ed. 2d 446, 460, 90 S. Ct. 1893, 1906.)

We conclude that the use of the term "jury" in the death penalty sentencing statute carries with it all of that word's legal incidents, including the concept of "group deliberation." Any deviation from this traditional interpretation must come from the legislature.

The defendant next asserts that a new jury should have been impaneled for the sentencing hearing because defendant injured himself in a suicide attempt and was at that point unfit to proceed. His motion for continuance was denied. Defendant, however, failed to raise this claim in his post-trial motion, and we therefore find that the issue

has been waived. (See *People v. Caballero* (1984), 102 Ill. 2d 23.) Apart from the waiver, our examination of the entire record leads us to conclude that the trial judge's decision to proceed with the original jury was not so prejudicial as to amount to plain error.

The defendant next raises a broad attack on the death penalty as disproportionate and as a violation of the privileges and immunities clause of the United States Constitution. (U.S. Const., art. IV, sec. 2.) This somewhat convoluted argument may be summarized as follows: The fourteenth amendment creates a national citizenship for all persons born in the United States. Such national citizenship carries with it certain incidents and rights which no State may infringe. As an example, the defendant cites *Edwards v. California* (1941), 314 U.S. 160, 86 L. Ed. 119, 62 S. Ct. 164, which declared a constitutional right of interstate travel. From that premise, the defendant goes on to point out that not all States have chosen to impose the death penalty. Thus, he argues, a national citizen may face qualitatively different penalties for the same act, depending merely upon the varying policies of different States. Given the death penalty's unique gravity and finality, the defendant argues that national citizens should be subject to it, if at all, under one consistent rule. He concludes that the death penalty is therefore unconstitutionally disproportionate and violates the privileges and immunities of national citizenship.

We find this argument wholly unpersuasive. First, the defendant's reasoning suffers from certain logical flaws. He asserts that citizens of States which have not chosen to adopt the death penalty are "immune" from it, while citizens of death penalty States are not. This, of course, is an inaccurate statement of the law. It is axiomatic that the law which is to be applied to criminal offenses depends not on the State citizenship of the offender, but rather on the situs of the offense. (Ill. Rev. Stat. 1983, ch. 38, par. 1-5.) Thus, citizens of Wisconsin, a State which has no death penalty, are nonetheless subject to it if they commit a capital offense in Illinois or any other death penalty

State. Therefore, no citizens are necessarily "immune" from the death penalty on the basis of where they reside.

This legal misstatement aside, however, we reject the defendant's theory for a more fundamental reason. His argument, reduced to its essentials, is that it is somehow improper for a capital offender in Illinois to face the death penalty, while the identical offense committed in Wisconsin would not warrant it. The death penalty is thus disproportionate, he argues, because not all States have chosen to employ it. The untenability of this assertion is best illustrated by taking it to a logical extreme. Under this reasoning, the death penalty would remain unconstitutional as long as any single State declined to enact it.

In our view, this theory violates the principles of federalism and judicial restraint which underlay *Gregg v. Georgia* (1976), 428 U.S. 153, 59 L. Ed. 2d 859, 96 S. Ct. 2909, the case in which capital punishment was upheld as constitutional. In that case, the court stated:

"[I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. * * * [A] heavy burden rests on those who would attack the judgment of the representatives of the people.

This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weight heavily in ascertaining such standards. * * * The deference we owe to the decisions of the state legislatures under our federal system [citations] is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy.' " 428 U.S. 153, 175-76, 49 L. Ed. 2d 859, 876, 96 S. Ct. 2909, 2926.

The above-quoted language from *Gregg* refers to a challenge based upon the eighth amendment ban on cruel and unusual punishment. We are of the opinion that these considerations apply with equal force to the defendant's theory.

Gregg holds that capital punishment is not *per se* unconstitutional. The delicate decision whether capital punishment is appropriate requires an assessment of the wide range of public attitudes on the subject. Such an assessment can only be carried out via the legislative process, for achievement of popular consensus on so sensitive an issue is precisely and properly the legislative role. This assessment of public attitudes may result, and indeed has resulted, in different policies from one State to the next. The States should be free to make such decisions for themselves, according to the moral dictates of their citizens.

The defendant's theory would turn this reasoning on its head, by effectively holding that if *one* State decided *against* the death penalty, *no other* State could decide *in favor* of it. The reasoned judgment of a given State legislature, entitled to great deference under *Gregg*, would be preempted by the judgment of another State legislature. We hold that this all-or-none approach defies the *Gregg* rationale, and we decline to embrace it.

Defendant next asserts that his death sentence is disproportionate and excessive in light of his character and personal background. We have previously stated that the determination whether a death sentence is proper in a particular case "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." (*Woodson v. North Carolina* (1976), 428 U.S. 280, 304, 49 L. Ed. 2d 944, 961, 96 S. Ct. 2978, 2991; *People v. Free* (1983), 94 Ill. 2d 378, 428; *People v. Carlson* (1980), 79 Ill. 2d 564, 590.) The proportionality requirement is met if the sentence is commensurate with the seriousness of the offenses and gives adequate consideration to relevant mitigating circumstances, including the potential for rehabilitation of the defendant. (*People v. Free* (1983), 94 Ill. 2d 378, 428-29; *People v. Carlson* (1980), 79 Ill. 2d 564, 587.) In light of our responsibilities in review of capital cases, we have not hesitated to vacate death sentences where improperly imposed. *People v. Walker* (1982), 91 Ill. 2d

502; *People v. Gleckler* (1980), 82 Ill. 2d 145; *People v. Carlson* (1980), 79 Ill. 2d 564.

Defendant relies primarily on one such case, *People v. Carlson* (1980), 79 Ill. 2d 564, in which this court vacated a death sentence and remanded for imposition of a lesser penalty. In *Carlson*, the defendant killed his ex-wife and a police officer, and had burned the ex-wife's home. The defendant and his ex-wife had planned to remarry, but she cancelled those plans and became engaged to another man. The crimes occurred after she broke the news to the defendant. Other evidence showed that, prior to his arrest, the defendant left a sum of money with a friend with instructions that it be given to his daughter for his son's use. We stated in *Carlson* that "[t]hese mitigating circumstances do not bespeak a man with a malignant heart who must be permanently eliminated from society." (*People v. Carlson* (1980), 79 Ill. 2d 564, 590.) We characterized the defendant as "an individual with no past criminal record who would in all probability be leading a life acceptable to our society had not his unfortunate marital affair triggered this tragic sequence of events." *People v. Carlson* (1980), 79 Ill. 2d 564, 590.

Carlson is not helpful. We are of the opinion that imposition of the death penalty was not unwarranted in this case. In mitigation, it was established that this defendant had no record of criminal convictions, had a stable work record and had treated his family members well. While these factors are relevant to the sentencing determination, their existence does not necessarily preclude imposition of the death penalty. *People v. Brownell* (1980), 79 Ill. 2d 508, 537.

In our view, the factors in aggravation are of sufficient gravity to more than outweigh these positive attributes. While it is true that defendant's record contains no criminal convictions, considerable evidence was adduced to indicate a history of criminal conduct. Most notable, of course, was evidence of the brutal killing of Sharon Egerer in Wisconsin. While defendant maintains his innocence, we

find the testimony against him, in particular that of Suzi Holton Eckerle, to be reliable and very damaging.

Also, unlike in *Carlson*, the crime here was in no way triggered by any independent provocation. Although once again the defendant denies involvement, the evidence established that the crimes were deliberate and cold blooded. To be convinced of defendant's guilt is also to be convinced of the ruthless manner in which he acted. In sum, we find no basis upon which to vacate the death sentence imposed by the jury.

The defendant's next contention, that Illinois' death penalty procedure is unconstitutional because it vests discretion to seek the death penalty in the prosecutor, has been repeatedly rejected. (*People ex rel. Carey v. Cousins* (1979), 77 Ill. 2d 531; *People v. Kubat* (1983), 94 Ill. 2d 437.) We are not persuaded to alter our position on this issue.

The defendant next raises two related arguments regarding the admission of evidence of the Egerer murder at his sentencing hearing. He first contends that evidence of the other crime, for which charges were pending in Wisconsin, should not have been admitted at all or, alternatively, that the other crime should have been proved beyond a reasonable doubt in order to be considered in aggravation.

With regard to defendant's first point, we have repeatedly held that a jury in the second phase of a sentencing hearing may consider any evidence which is reliable and relevant. (*People v. Collins* (1985), 106 Ill. 2d 237, 282; *People v. Silagy* (1984), 101 Ill. 2d 147, 174.) This includes evidence of crimes with which the defendant has been charged but not convicted. (*People v. Collins* (1985), 106 Ill. 2d 237, 282.) Insofar as the sentencing process is intended to be a wide-ranging inquiry into every identifiable factor which tends to aggravate or mitigate the offense, the formal rules of evidence do not apply. (*People v. La Pointe* (1981), 88 Ill. 2d 482, 494-85; *People v. Adkins* (1968), 41 Ill. 2d 297, 300-01.) For the sentencing jury to

close its eyes to otherwise reliable, highly relevant evidence would defeat these purposes.

Defendant also asserts, somewhat obliquely, that consideration of charged but convictionless crimes amounts to multiple punishment for the same offense. He cites *Jeffers v. United States* (1977), 432 U.S. 137, 53 L. Ed. 2d 168, 97 S. Ct. 2207, in support of this assertion. *Jeffers*, however, is a fairly basic double jeopardy case, and has nothing whatsoever to do with the admissibility of other-crimes evidence at sentencing proceedings. We thus find *Jeffers* wholly inapposite.

In our view, admission of criminal *charges* at sentencing is no more a double jeopardy violation than admission of criminal *convictions*. The admissibility of convictions has been repeatedly upheld. (*E.g.*, *People v. Adkins* (1968), 41 Ill. 2d 297.) Likewise, we reject the defendant's assertion that the Wisconsin crime should have been proved beyond a reasonable doubt. We have reiterated that the only requirement for admissibility is that the evidence be reliable and relevant. (*People v. Free* (1983), 94 Ill. 2d 378, 422; *People v. La Pointe* (1981), 88 Ill. 2d 482, 497.) We find that the testimony relating to the Wisconsin crime clearly meets this standard.

The defendant also objects to certain questions posed to several witnesses on direct examination and cross-examination. Specifically, he claims that some questions enabled otherwise inadmissible evidence to go before the jury, and that the cross-examination of the defendant at the sentencing hearing was prejudicial.

During the direct examination and cross-examination of the FBI fiber expert, it was established that fiber comparison is an inexact science, and that at best it could be established that two hairs or fibers were "consistent." The trial court had previously ruled that the expert could not testify as to his ultimate conclusion based upon the number of associations. That conclusion was to be left for the jury.

In spite of this prior ruling, the prosecutor, on redirect examination, asked the witness for his overall opinion. While this question was in direct disregard of the court's earlier ruling, and we thus disapprove of the prosecutor's conduct in this respect, we do not believe that error resulted for a very basic reason: An objection was interposed before the question was even finished, and the objection was immediately sustained. The court stated that the probative value of the fiber comparisons was a jury issue. We find that the court's action was proper and prevented any error from resulting.

The defendant also asserts that certain lines of questions asked of him on cross-examination went beyond the bounds of permissibility. For example, the defendant was asked to explain "how fibers from [his] sleeping bag could have gotten in Michelle Thompson's hair?" Counsel objected that the fibers had not been identified positively, but the objection was overruled. Defendant now claims that such questions contained "false insinuations," comparable to those asked in *People v. Nuccio* (1969), 43 Ill. 2d 375, where such questions were grounds for reversal.

We find *Nuccio* distinguishable. In that case, the defendant was asked questions which implied involvement in misconduct which was completely unsubstantiated. The prosecution then failed to present rebuttal witnesses to support these insinuations. Here, the questions related to fiber evidence which, while not 100% conclusive, was nonetheless before the jury for its consideration. The questions did not involve matters which were wholly outside the evidence presented, as had been the case in *Nuccio*.

The last example of alleged improper cross-examination admittedly gives us pause. Near the end of the defendant's cross-examination, he was shown pictures of Sharon Egerer and Michelle Thompson. Thereafter, the following exchange occurred:

"Q. Whoever killed her, whether it was Mr. William Garris or you, would you agree that she was butchered in a brutal, sadistic and cruel and inhuman fashion?

A. I could not tell you. I didn't see the body.

Q. Did you look at the pictures?

A. No. They never showed me no pictures.

Q. I'll show you a picture, Mr. Sanchez. Let me show you People's Exhibit 9, which has been previously identified, a photograph of a woman lying face down, her hands behind her and with cable around her neck and ask you to look at that for the first time and tell this jury if whoever killed her in your opinion killed that woman in a sadistic, brutal and inhumanly cruel manner?

A. Yes, that is what it looks like, I can't see. I just see the red.

Q. Do you see her hand tied behind her back?

A. Yes.

Q. Would you admit whoever might have killed Michelle Thompson, would you agree that she lived through unimaginable terror as she was dragged from that parking lot, kicking and screaming as the evidence indicated?

A. I would not know. I was not there. I don't know what happened.

Q. Well, you heard the testimony. What do you think, Mr. Sanchez. What do you think she lived through as she was dragged kicking and screaming?

A. Yes.

Q. And would you agree whoever killed her, the photograph of Michelle Thompson indicates she was beaten?

A. Yes.

Q. Savagely from head to toe?

A. Yes.

Q. Whoever did do it to her Mr. Sanchez, would you agree she was sodomized and her body ripped open?

MR. COLLINS: Objection. That is not the evidence.

BY MR. MARGOLIS:

Q. Would you agree, Mr. Sanchez—

MR. COLLINS: If your Honor, please, Mr. Margolis is using a colorful cross-examination. And at this

point some of it is proper but it is going beyond the evidence in this case and he is doing it for the death penalty effect. I object to it.

MR. MARGOLIS: This is the proper time, Your Honor, to ask such questions of this witness.

MR. COLLINS: There is a proper time to ask questions that have something to do with the record and a body being ripped open is not proper.

MR. MARGOLIS: I will rephrase the question.

BY MR. MARGOLIS:

Q. Would you say, sir, that the way that Michelle Thompson was sodomized was ugly and brutal and despicable?

A. Yes.

Q. Tell the jury, sir, what mitigating factors would cause a jury to not oppose the death penalty on facts such as this?

MR. COLLINS: I object.

THE COURT: Sustained.

MR. COLLINS: If the court please, I would like to be heard on that question. If your Honor, please, there is no possibility that Mr. Margolis thought that last question was a proper question.

It is never the function of defendant to argue his own case. I would suggest that question is so grossly improper that I move for mistrial at this time.

THE COURT: Denied."

The defendant argues that such questioning crossed the line of tolerable prosecutorial zeal, that the questions were intended only to degrade the defendant rather than elicit factual matters, and that sustaining his objection was insufficient to cure the resulting prejudice. In particular, he contends that the final question left the jury with the impression that the defendant himself could think of no reason why he should live.

While we acknowledge that the prosecutor's conduct was possibly overzealous, our review of the entire record compels the conclusion that it did not rise to the level of reversible error. Generally, the latitude permitted on

cross-examination is left to the sound discretion of the trial court. (*People v. Williams* (1977), 66 Ill. 2d 478.) A court of review will disturb the decisions of the trial court only if manifest prejudice has resulted. (*People v. Williams* (1977), 66 Ill. 2d 478.) We do not find that counsel's conduct here fits the pattern of prosecutorial conduct condemned in *People v. Adams* (1985), 109 Ill. 2d 102, *People v. Lyles* (1985), 106 Ill. 2d 373, or *People v. Brisbon* (1985), 106 Ill. 2d 342. More typically, we have permitted counsel considerable latitude in cross-examination and argument, finding error only in the most egregious cases.

Thus, our cases have established that the border between permissible and impermissible conduct is imprecise, and that the determination depends in part, at least, on the closeness of the case as established by the entire record. Where the question of guilt or innocence or, as here, the relative weight of factors in aggravation and mitigation is relatively clear cut, we are less inclined to hold that "absent the constitutionally forbidden [inquiry], honest, fair-minded jurors might very well have brought in" a different result. (*Chapman v. California* (1967), 386 U.S. 18, 25-26, 17 L. Ed. 2d 705, 711, 87 S. Ct. 824, 829.) In this case, we view the aggravating factors as clearly sufficient to support the sentence the jury imposed. Also, much of the cross-examination was not objected to, and the objection that defendant did make was sustained. The objectionable question was thus left unanswered and amounted to no more than an assertion by counsel such as might well have been urged in a final argument. We are not persuaded that the challenged prosecutorial conduct amounted to reversible error.

The defendant's next claims, that the trial court abused its discretion in permitting certain redirect examination at the sentencing hearing, and that the prosecutor's closing argument was improper, have been waived by the failure to include them in his post-trial motion. See *People v. Caballero* (1984), 102 Ill. 2d 23.

The defendant's final point is that the trial court erred in refusing to give a proposed non-IPI instruction to the

effect that the death penalty determination should not be influenced by sympathy for the family of the victim. This instruction was necessary, he argues, because Michelle Thompson's mother testified and, in what was undoubtedly an emotional moment, broke down on the witness stand.

The decision whether to give a non-IPI instruction is a matter for the discretion of the trial court. (*People v. Goodson* (1985), 131 Ill. App. 3d 734; *People v. Mitchell* (1984), 129 Ill. App. 3d 189.) When an applicable IPI instruction exists, that instruction should be given rather than a non-IPI instruction. 87 Ill. 2d R. 451(a).

In this instance, the jury was given the pattern instruction on sympathy, which provides, "Neither sympathy nor prejudice should influence you." (IPI Criminal 2d No. 1.01(5).) Defendant contends that this pattern instruction refers only to sympathy or prejudice based upon race or nationality and was inadequate to negate improper feelings of sympathy for the victim. We do not agree. The instruction provides, in plain terms, that sympathy is not to influence the jury decision in any way. More specific references to sympathy engendered for a particular reason or toward a particular person would only highlight that issue in the jurors' minds. We find no abuse of discretion in refusing to so instruct.

Having resolved the issues presented in the defendant's direct appeal, we now turn to his petition for relief under section 2-1401 (Ill. Rev. Stat. 1983, ch. 110, par. 2-1401). His petition, including amendments, was dismissed by the trial court without an evidentiary hearing. We granted leave to consolidate the appeal of that decision with his direct appeal.

Following his conviction in the instant case, defendant was transferred to Milwaukee County jail in Wisconsin to await trial for the Sharon Egerer homicide. Sometime thereafter, defendant's counsel learned that Oscar Cartegena, another prisoner in the Milwaukee County jail, had information regarding the crimes that occurred at D. Laney's in February of 1984. An investigator employed by defendant's counsel interviewed Cartegena.

Cartegena stated to the investigator that he had previously met Michelle Thompson and that she had phoned and asked him to meet her at D. Laney's on February 3, 1984. He went there, arriving at about 11:45, and waited in the parking lot to meet Thompson. He observed her and a man whose description fit Rene Valentine go in and out of the bar several times. He also noticed a van and a car containing two black men parked near his car.

Sometime thereafter, several men got out of the van and pulled Valentine into it. One of the men from the car grabbed Thompson and dragged her to the van. A few moments later, she was taken from the van and into the car, which then drove off. She was totally nude at that point. The description of the driver of the car fit Warren Peters. A few moment later, Valentine emerged from the van and was shot by one of the men. Sanchez was not among the group of abductors seen by Cartegena.

The defendant's investigator prepared and signed an affidavit of what he had been told, which was presented in support of defendant's motion to vacate his conviction pursuant to section 2-1401 of the Code of Civil Procedure. The motion was stricken on the basis that the affidavit was insufficient as containing bare hearsay.

Defendant later filed an amended motion which stated that Cartegena's attorney had let it be known that if Cartegena were called to testify in any proceeding he would invoke the fifth amendment. Defendant accordingly requested that the trial court order the State to confer immunity upon Cartegena. The trial court denied these motions and dismissed the petition without a hearing.

A petition under section 2-1401 must satisfy two elements to warrant relief. It must establish adequate grounds for such relief and must show that the petitioner was not negligent in failing to raise the ground at trial. (*People v. Jennings* (1971), 48 Ill. 2d 295.) However, the trial judge did not reach the merits of the defendant's petition, and hence did not apply these standards. As mentioned, the petition was dismissed without a hearing on

the basis that the accompanying affidavit was insufficient. In our view, this summary disposition was inappropriate, and we remand for an evidentiary hearing on the petition.

As a general rule, a petition supported by an attorney's affidavit containing only hearsay is insufficient to warrant relief under section 2-1401. (*Windmon v. Banks* (1975), 31 Ill. App. 3d 870.) However, we decline to apply this rule inflexibly, especially in capital cases where procedural fairness and factual accuracy are of paramount importance.

We find support for this viewpoint in the rules governing affidavits in other contexts. Supreme Court Rule 191 governs affidavits in proceedings under sections 2-1005 (summary judgment), 2-619 (involuntary dismissal) and 2-301(b) (special appearances) (Ill. Rev. Stat. 1985, ch. 110, pars. 2-1005, 2-619, 2-301(b)). Rule 191(a) provides that affidavits shall be made on the personal knowledge of the witness and shall show that the affiant, if sworn as a witness, could testify competently to the contents of the affidavit. This requirement would generally preclude hearsay affidavits. (87 Ill. 2d R. 191(a).

Rule 191(b) provides an exception to this general rule, however, in situations where "material facts which ought to appear in the affidavit are known only to persons whose affidavits affiant is unable to procure by reason of hostility or otherwise." (87 Ill. 2d R. 191(b).) The rule goes on to provide that in such situations the court may "make any order that may be just," including granting or denying the underlying motion.

While Rule 191 does not explicitly include affidavits in support of petitions under section 2-1401, we believe the reasoning behind the Rule 191(b) exception is equally applicable in that setting. In this case, the investigator's affidavit states that "material facts" are known to Oscar Cartegena, but that an affidavit to that effect cannot be procured due to Cartegena's invocation of the fifth amendment. In our view, this showing is sufficient to warrant an evidentiary hearing on the petition, at which Cartegena can be examined. The fifth amendment protection was asserted not by the witness but by his attorney.

We realize that Cartegena may himself invoke the fifth amendment if called to testify. However, as with any such claim, the trial court must make a threshold determination whether the privilege is being legitimately invoked. The mere fact that a witness has made a blanket fifth amendment assertion is not the end of the inquiry. (See *Zicarelli v. New Jersey State Com. of Investigation* (1972), 406 U.S. 472, 32 L. Ed. 2d 234, 92 S. Ct. 1670.) If the trial court determines that Cartegena's privilege claim is improper, the court can, of course, order him to testify.

Defendant also bases his claim for relief on the allegedly perjured testimony of Warren Peters. With regard to perjury as the basis for relief under section 2-1401, we have stated:

"The mere allegation of perjury is not sufficient to authorize relief under [section 2-1401]; perjured testimony that warrants relief from a final judgment must be shown by clear and convincing evidence to have been not merely false, but to have been willfully and purposely given, and to have been material to the issue tried and not merely cumulative, and that it probably controlled the determination." *People v. Jennings* (1971), 48 Ill. 2d 295, 299; *People v. Lewis* (1961), 22 Ill. 2d 68, 71.

The defendant argues that perjury has been established by Peters' "recantation" at his own sentencing hearing, and that the charge of perjury is further substantiated by Cartegena's statement. He contends that at the very least the trial court should have granted an evidentiary hearing on these claims.

With regard to the alleged recantation, we have examined the transcript of Peters' sentencing hearing. The claim that Peters' "recanted" at that proceeding is an overstatement. Peters admitted at his sentencing hearing that he changed certain immaterial aspects of his testimony between his own trial and that of Sanchez, and that as to certain statements he had lied. However, Peters said nothing which even approaches retraction of his essential

testimony—that Sanchez performed the criminal acts for which he was convicted. We note that in the course of his own trial, Sanchez' trial and his own sentencing hearing, Peters has been subjected to extensive cross-examination three separate times. Based upon our assessment of the record, Peters has never deviated from his story in any significant sense, or to the extent that one can say that Sanchez was convicted through the use of perjured testimony. Those aspects which may have been changed cannot be said to have been relevant to the determination.

Although that aspect of the section 2-1401 motion relating to Peters' alleged perjury is not convincing, as indicated above, we hold that the court erred in not conducting an evidentiary hearing as to the allegations concerning the testimony of Cartegena. If the evidence produced at the evidentiary hearing is sufficient under accepted standards, the court may grant the relief prayed.

For the above reasons, the convictions and sentences of defendant in cause No. 61239 are upheld and the judgments of the circuit court of Lake County are affirmed in that case, but the execution of the sentence of death is stayed pending disposition of the petition under section 2-1401 by the circuit court of Lake County. The judgment of the circuit court of Lake County in cause No. 63683 is reversed, and the cause is remanded for further proceedings consistent with this opinion.

*61239 — Judgment affirmed;
death sentence stayed.*

*63683 — Reversed and remanded,
with directions.*

JUSTICE GOLDENHERSH, concurring in part and dissenting in part:

In discussing the issues presented in this appeal, the majority states: "The last example of alleged improper cross-examination admittedly gives us pause." (Slip op. at 26.) Indeed, it should; it is the most flagrant example of improper, prejudicial cross-examination to come before this court in the many cases involving death penalties.

Defendant correctly asserts that these questions were not designed to elicit facts but were intended to, and did, degrade the defendant in the eyes of the jury, to his prejudice.

The integrity of the judicial process requires that this type of interrogation be prohibited and that a judgment resulting from such tactics be reversed. The belated sustaining of an objection to the questions falls far short of removing the prejudice which it created.

I agree with the majority that the misconduct here does not fit the pattern of that found in *People v. Adams* (1985), 109 Ill. 2d 102, *People v. Lyles* (1985), 106 Ill. 2d 373, or *People v. Brisbon* (1985), 106 Ill. 2d 342; it was much more egregious. In those cases the prosecutor had some basis, however tenuous, for his position; here there is no justification for the type of cross-examination shown in this record.

Although I agree with the majority that the conviction for murder must be affirmed, I am of the opinion that defendant did not receive a fair hearing. I would vacate the death penalty and remand the cause for a new presentence hearing.

CLARK, C.J., and SIMON, J., join in this partial concurrence and partial dissent.

JUSTICE SIMON, also concurring in part and dissenting in part:

I agree that the conviction should be affirmed and that the petition under section 2-1401 of the Code of Civil Pro-

cedure should be remanded for an evidentiary hearing. I part company with the majority, though, on its treatment of the cross-examination of the defendant at the sentencing hearing. While that cross-examination only "gives * * * pause" to the majority (slip op. at 26), it convinces me that the defendant did not receive a fair penalty hearing.

As is aptly demonstrated in the passage quoted by the majority, the prosecutor attempted (with some success) to force the defendant to agree that the crimes—whoever committed them—were "brutal," "savage," and "sadistic," that Sharon Egerer had been "butchered," and that Michelle Thompson's body had been "ripped open." These questions were purely argumentative: by asking them the prosecutor sought not to establish any relevant facts, but only to invoke the witness' assent to the prosecutor's characterization of the facts. (E. Cleary and M. Graham, Illinois Evidence sec. 611.23, at 417 (4th ed. 1984).) The repeated use of inflammatory language in these questions aggravated the unfairness. Facts concerning the brutality of the killings were already before the jury and were plainly relevant to the character of the offender and the circumstances of the offense. But the barrage of emotionally charged questions pertaining to the defendant's *opinion* of the nature of the killings which he denied committing—and one of which he had not been proved guilty of committing—was designed only to "harass" and "humiliate" the witness (*People v. Lyles* (1985), 106 Ill. 2d 373, 402) and thereby to increase the likelihood that the jury would return a verdict of death.

Equally outrageous was the final question in which the prosecutor asked for the defendant's thoughts as to what type of mitigation could cause the jury not to impose the death penalty on such facts. That question either called for a legal judgment which the defendant was unqualified to make or sought to force the defendant to make his own closing argument while on the witness stand. It also suggested to the jury that the burden of proving the inappropriateness of the death penalty rested on the defendant

personally. The majority contends that because counsel's objection to this question was sustained, the unanswered question "amounted to no more than an assertion by counsel such as might well have been urged in a final argument." (Slip op. at 29.) The point is that this was *not* closing argument, but a question put to the defendant on the witness stand at the end of a lengthy and improper line of cross-examination. That the question was never answered may have left the jury believing that the defendant could conceive of no reason why he should be spared. The only effect of this line of questioning was to unfairly prejudice the defendant and thus to distract the jury from its proper task.

In case after case involving the death penalty, this court has been confronted with blatant abuses of the prosecutorial function. (See, e.g., *People v. Hope* (Feb. 21, 1986), No. 58462; *People v. Brisbon* (1985), 106 Ill. 2d 342; *People v. Lyles* (1985), 106 Ill. 2d 373; *People v. Holman* (1984), 103 Ill. 2d 133; *People v. Ramirez* (1983), 98 Ill. 2d 439.) A death penalty trial is neither a war nor a circus, and while emotions may run high, it is absolutely essential if law is to prevail that a decision of this gravity be made in a reasoned fashion. Overreaching by prosecutors intent on securing a verdict of death makes this impossible. The majority's characterization of the conduct in this case as "possibly overzealous" (slip op. at 28) but not reversible error will simply encourage prosecutors to continue treading close to, and over, the line of proper behavior. The majority regards this "border * * * [as] imprecise" (slip op. at 29), but the very imprecision which the court has tolerated will inevitably result in an expansion of the boundaries of acceptable prosecutorial "zeal" as, in future cases, prosecutors encouraged by decisions such as this one, will push even further in harassing and prejudicing defendants by improper conduct. As a consequence, the overall fairness of capital trials will continue to erode. A stable and clearly drawn line is needed, and I would indelibly stamp the tactics employed here as unconstitutional.

The error here was not only egregious, but should result in a new penalty hearing. The majority apparently holds that since "the relative weight of factors in aggravation and mitigation is relatively clear cut" (slip op. at 29), the error was harmless.

The idea that this type of prosecutorial misconduct can be harmless or not reversible error in a sentencing hearing arises from a fundamental misunderstanding of the nature of the sentencing decision. Error at *trial* may be harmless if the evidence of the defendant's guilt is so overwhelming that conviction was inevitable even in the absence of error. (*United States ex rel. Burke v. Greer* (7th Cir. 1985), 756 F.2d 1295, 1302; *People v. Carlson* (1982), 92 Ill. 2d 440, 449.) Error at a sentencing hearing is an altogether different matter, however; there the jury is not asked to decide a question of fact, but must exercise its judgment in choosing among possible sanctions. Unlike a verdict of guilt or innocence which is properly an objective determination based solely on the evidence presented, any sentencing decision is a discretionary judgment in which many factors—some of them objective, but many subjective—play a role. The discretionary nature of sentencing is illustrated by the difficulty in achieving anything approaching uniformity in conventional sentences: one offender may receive five years for an offense while a similarly situated defendant sentenced by a different judge gets 10. With respect to capital trials, there is plainly neither any set of circumstances nor any body of law which mandates that a particular jury, or even a particular judge, must impose a death sentence. In view of the subjective factors which may influence the outcome, it is therefore inappropriate to speak of overwhelming evidence in support of the decision to impose the death penalty or to suggest, as the majority does here, that the decision can be "relatively clear cut" (slip op. at 29). This is particularly evident where a jury, which is not used for sentencing purposes in Illinois except in capital cases and which is not permitted to explain the reasons for its decision, imposes the death sentence. No matter how sub-

stantial the evidence in aggravation may be, inflammatory prosecutorial conduct may tip the balance and can never be dismissed as harmless error.

Even if the harmless-error rule could be applied in these circumstances, the majority has expanded it beyond recognition. The court views the "aggravating factors as *clearly sufficient* to support the sentence the jury imposed." (Emphasis added.) (Slip op. at 29.) While I am not sure what is meant by "clearly sufficient," this appears to represent either a conclusion by the majority that there was substantial evidence in favor of the jury's decision or that it was not against the manifest weight of the evidence. Neither is the proper standard under which the harmlessness of an error is to be judged. Rather, the evidence must be so overwhelming that it is clear beyond a reasonable doubt that the error did not affect the decision. (*United States ex rel. Burke v. Greer* (7th Cir. 1985), 756 F.2d 1295, 1302.) On this standard, we obviously cannot conclude that the error in permitting emotional, badgering, and argumentative cross-examination of the defendant was harmless. Significant evidence in mitigation was presented, including evidence that the defendant had been abused as a child, that he had held a job for some 14 years, and that he had saved enough to build a house. The defendant had no criminal convictions, and he had treated his family well. It was up to the jury to decide whether the evidence in aggravation outweighed that presented in mitigation. The jury's consideration of this question was tainted, though, by the prejudicial cross-examination of the defendant.

The admission of evidence concerning the killing of Sharon Egerer (not the murder for which the defendant was convicted) also poses a far more difficult problem than the majority seems willing to acknowledge. True, this court has held that the rules of evidence do not apply at the second stage of the penalty phase, and reliable other-crimes evidence may be admitted. I think, however, that the more serious the "other" offense, the more reliable such evidence should be. Otherwise the jury may sentence

the defendant to death, perhaps not mainly because of the killing of which he has just been proved guilty beyond a reasonable doubt, but instead because of another killing of which there is simply some evidence. To protect the defendant against the jury giving undue weight to a murder which has not been established beyond a reasonable doubt, no evidence of another killing should be admitted absent a conviction for that offense. Although this could pose some difficulty in a case like this one in which the defendant has been accused of two independent killings which cannot be tried together, I see no reason why sentencing on the first conviction could not be stayed pending trial on the other offense when a defendant requests a delay for that purpose. While a new jury would have to be impaneled for sentencing (if the defendant requested a jury), that is but a small price to pay to ensure that such damning evidence be reliable.

CHIEF JUSTICE CLARK joins in this partial concurrence and partial dissent.

APPENDIX B

(Letterhead of)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

January 30, 1987

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No. 61239 — People State of Illinois, appellee v. Hector
63683 Ruben Sanchez, appellant. Appeal, Circuit
Cons. Court (Lake).

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on February 9, 1987.

No. 86 - 1599

Supreme Court U.S.
FILED

MAY 28 1987

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HECTOR REUBEN SANCHEZ,

Petitioner,

VS.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether Petitioner's constitutional rights were infringed where Petitioner bore no burden of proof during the sentencing phase of his capital trial?

II.

Whether the harmless error doctrine is applicable to constitutional errors made during the sentencing phase of a capital trial?

III.

Whether the trial court properly refused an instruction which would have permitted the jurors to consider mercy as an independent sentencing factor?

IV.

Whether the "risk of non-persuasion" is afforded constitutional protection?

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No. 86 - 1599

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HECTOR REUBEN SANCHEZ,

Petitioner,

VS.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of Illinois**

RESPONDENT'S BRIEF IN OPPOSITION

PRAYER

Respondent asks this Court to deny the petition for writ of certiorari to review the judgment and order of the Supreme Court of Illinois insofar as the issues raised by Petitioner do not raise questions of constitutional proportion worthy of review by this Court.

OPINION BELOW

Petitioner seeks review from an Illinois Supreme Court opinion in *People v. Sanchez*, 115 Ill.2d 238 (1986). Petitioner has appended a copy of this opinion to his Petition. The Illinois Supreme Court decided Petitioner's petition for rehearing on January 30, 1987.

JURISDICTION

The jurisdictional requirements have been adequately set forth in the Petition. As treated more fully in the argument contained herein, however, Petitioner has failed to demonstrate grounds for this Court to exercise its sound discretion to grant his Petition for Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMENDMENT VI:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

Ill. Rev. Stat. ch. 38, § 9-1(e) (1985):

Evidence and Argument. During the proceeding any information relevant to any of the factors set forth in subsection (b) may be presented by either the State or

the defendant under the rules governing the admission of evidence at criminal trials. Any information relevant to any additional aggravating factors or any mitigating factors indicated in subsection (c) may be presented by the State or defendant regardless of its admissibility under the rule governing the admission of evidence at criminal trials. The State and the defendant shall be given fair opportunity to rebut any information received at the hearing.

Ill. Rev. Stat. ch. 38, § 9-1(g) (1985):

Procedure—Jury. If at the separate sentencing proceeding the jury finds that none of the factors set forth in subsection (b) exists, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections. If there is a unanimous finding by the jury that one or more of the factors set forth in subsection (b) exist, the jury shall consider aggravating and mitigating factors as instructed by the court and shall determine whether the sentence of death shall be imposed. If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death.

Unless the jury unanimously finds that there are no mitigating factors sufficient to preclude the imposition of the death sentence the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

STATEMENT OF FACTS

On the night of February 3, 1984, Petitioner and an accomplice kidnapped 21-year-old Michelle Thompson from a parking lot in Gurnee, Illinois. (R. 1663-1665)

Petitioner took Ms. Thompson to his home, where he beat, raped and then strangled Ms. Thompson to death. (R. 1679) Petitioner and his accomplice then drove Ms. Thompson to Wisconsin, where they dumped her nude body in a roadway. (R. 1688)

After a jury trial, Petitioner was found guilty of attempted murder, rape, deviate sexual assault, murder, and aggravated kidnapping. (R. 2619)

Having been found eligible for the death penalty, Petitioner was given a sentencing hearing, wherein aggravating and mitigating evidence was given. The evidence in aggravation included testimony regarding Petitioner's shooting, stabbing, and strangulation of his ex-wife. (R. 2716-2722)

Towards the end of the sentencing hearing, the following colloquy took place between the prosecution and Petitioner:

Q. Would you say, sir, that the way that Michelle Thompson was sodomized was ugly and brutal and despicable?

A. Yes.

Q. Tell the jury, sir, what mitigating factors would cause a jury to not oppose the death penalty on facts such as this?

Mr. Collins: I object.

THE COURT: Sustained.

Mr. Collins: If the court please, I would like to be heard on that question, If your Honor, please, there is no possibility that Mr. Margolis thought that last question was a proper question.

It is never the function of defendant to argue his own case. I would suggest that question is so grossly

improper that I move for mistrial at this time.

THE COURT: Denied.

(R. 2909)

After deliberations, the jury found no mitigating factors sufficient to preclude imposition of the death penalty. The court subsequently sentenced Petitioner to death by lethal injection. (C. 426)

The Illinois Supreme Court affirmed Petitioner's judgment and conviction on December 19, 1986.

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT INFRINGED WHERE HE BORE NO BURDEN OF PROOF DURING THE SENTENCING PHASE OF HIS CAPITAL TRIAL.

Petitioner's initial assertion is that a burden of proof was improperly placed on him during the sentencing phase of his trial. A brief review of the pertinent facts is necessary to demonstrate that 1) Petitioner's argument is merely a factual one; and 2) Petitioner has not raised a novel question of constitutional law meriting review by this Court.

As Petitioner correctly notes, Illinois law does not place a burden of proof on either party during the sentencing phase of a capital trial. Ill. Rev. Stat. ch. 38, § 9-1(e) (1985). Given that, Petitioner has taken issue with the People's query of him during the sentencing phase of his trial:

“Tell the jury, sir, what mitigating factors would cause a jury to not oppose the death penalty on facts such as this?” (R. 2909)

Putting aside whether this question can accurately be deemed to have placed a burden of proof on Petitioner, the salient point is that Petitioner was not in fact put in the position of answering this question. The question was objected to, and the objection sustained. (R. 2909) Thus Respondent would urge that as this Court considers the various arguments Petitioner has posited in connection with the aforesaid question, this Court remembers that the objection to the question at issue was sustained.

It is also important to bear in mind that both the People and Petitioner informed the jurors several times during the sentencing hearing that neither party bore a burden of proof. For example, immediately after Petitioner's counsel objected to the question at issue, Petitioner's counsel said, “If the court please, I would like to be heard on that question. . . . It is never the function of defendant to argue his own case. . . .” (R. 2909) Petitioner's counsel also later noted in his closing argument that there was no burden of proof in the sentencing hearing. (R. 2938) Finally, the People stated in their closing argument that “The defendant has no burden of proof. There is no burden of proof on anybody. . . .” (R. 2931) Thus, Petitioner's assertion that an impression was left that he bore a burden of proof is without factual basis.

Apart from the fact that Petitioner's argument is not well-grounded in fact, Petitioner has failed to raise a novel question of law worthy of review by this Court. Indeed, instead of attempting to demonstrate that he posits an important and undecided question before this Court, Petitioner simply relies on precedent which in any event is inapposite.

For example, Petitioner relies upon *Mullaney v. Wilbur*, 421 U.S. 684 (1975) and *Sandstrom v. Montana*, 442 U.S. 510 (1979) in support of his argument that the burden of proof was improperly shifted to him during sentencing.

The predicate question in *Mullaney, id.*, and *Sandstrom, id.*, is instructive. In both cases, the predicate question was whether a juror could have reasonably believed that a mandatory burden of proof had been shifted to the defendant. *Mullaney*, 421 U.S. at 701; *Sandstrom*, 442 U.S. at 515. In each case, the Court found that the instructions at issue contained improper presumptions that the jurors must have construed as burden-shifting in nature. *Mullaney*, 421 U.S. at 702; *Sandstrom*, 442 U.S. at 517.

In the instant case, however, there is no instruction containing an improper presumption. There is only an ambiguous question which Petitioner was excused from answering. Thus, Petitioner's reliance on *Mullaney* and *Sandstrom* is unavailing.

Petitioner's reliance on *Caldwell v. Mississippi*, 105 S. Ct. 2633 (1985) is misplaced as well. Petitioner relies on *Caldwell* in support of his argument that the jurors might erroneously have believed that they were not responsible for imposition of the death penalty. Far from supporting Petitioner's argument, however, *Caldwell* well illustrates the tenuous nature of Petitioner's argument.

In *Caldwell, id.*, the prosecutor told the jurors in closing that "the decision you render is automatically reviewable by the Supreme Court." 105 S.Ct. at 2638. Clearly there was no question in *Caldwell* but that the jurors were led to believe that they were not wholly responsible for imposition of the death penalty. In the instant cause, however, there was no comparable direction to the jurors diminishing their responsibility. There is only inference,

and that inference is exceedingly speculative. Petitioner's request for review of this issue should accordingly be rejected.

In connection with the aforestated argument, Petitioner argues that to the extent that he was put in the position of arguing his own case in mitigation, he was deprived of his Sixth Amendment right to counsel.

The primary reason this Court should reject this argument is because it was not raised in the state courts.

This Court has affirmed time and again that it cannot and will not exercise jurisdiction over questions which have not been presented in the state courts. *Jones v. Hildebrant*, 432 U.S. 183, 188-189 (1977); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Cardinale v. Louisiana*, 394 U.S. 437, 438-439 (1969); *Department of Mental Hygiene of California v. Kirchner*, 380 U.S. 194, 197 (1965); see 28 U.S.C.A. § 1257(3) (1976).

Given Petitioner's failure to comply with this requirement, his assertion should be rejected on grounds of lack of jurisdiction.

Even apart from the jurisdictional issue, Petitioner's Sixth Amendment argument is wholly without merit, primarily because it is without factual basis. Petitioner was asked the question at issue, his counsel objected, and that objection was sustained. How this sequence of events operated to deprive Petitioner of counsel is difficult to discern, and Petitioner has provided no caselaw in support of his argument. The claim should accordingly be rejected.

II.

THE HARMLESS ERROR DOCTRINE IS APPLICABLE TO CONSTITUTIONAL ERRORS MADE DURING THE SENTENCING PHASE OF A CAPITAL TRIAL.

Petitioner asserts that the Illinois Supreme Court erred in applying the harmless error doctrine to the alleged error made during the sentencing phase of Petitioner's trial. Petitioner's claim should be rejected, however, because 1) Petitioner's constitutional rights were not infringed during the sentencing phase of his trial; and 2) if error did occur, it was entirely appropriate to apply a harmless error analysis.

As explained *supra*, at pp. 5 to 6, Petitioner has failed to demonstrate that a burden of proof was placed upon him during the sentencing phase of his trial.

Assuming *arguendo* that there was error, however, this Court has already established principles that address Petitioner's query. In *Delaware v. Van Arsdall*, 106 S.Ct. 1431 (1986), this Court noted that "[t]he harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Id.* at 1463. Thus, if a defendant has been represented by counsel at trial, and if he has been tried before an impartial judge, there is a "strong presumption" that any other errors that may have occurred at trial are subject to a harmless error analysis. *Rose v. Clark*, 106 S.Ct. 3101, 3107 (1986). Indeed, only those errors that effectively abort the basic trial process are deemed to be ineligible for a harmless error analysis. See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (denial of counsel); *Payne v. Arkansas*, 356 U.S. 560 (1958) (use of coerced confession); *Tumey v. Ohio*, 273 U.S. 510 (1927) (biased adjudicator).

Given these perimeters on the scope of the harmless error doctrine, courts have not constrained themselves from applying a harmless error analysis to asserted errors at sentencing. See *United States v. Reese*, 775 F.2d 1066, 1075 (9th Cir. 1985); *Funchess v. Wainwright*, 772 F.2d 683, 693 (11th Cir. 1985), *cert. denied*, 106 S.Ct. 1242 (1986) (capital case); *United States v. Rosen*, 764 F.2d 763, 767 (11th Cir. 1985), *cert. denied sub nom. Holmes v. U.S.*, 106 S.Ct. 806 (1986); *United States v. Gomer*, 764 F.2d 1221, 1223 (7th Cir. 1985); *Watson v. Blackburn*, 756 F.2d 1055, 1058 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 2259 (1986) (capital case).

Moreover, it is to be noted that in *Rose v. Clark*, 106 S.Ct. 3101 (1986), this Court affirmed that an instruction shifting the burden of proof to defendant is subject to a harmless error analysis. This Court noted, "When the verdict of guilty reached in a case in which *Sandstrom* error was committed is correct beyond a reasonable doubt, reversal of the conviction does nothing to promote the interest that the rule serves." 106 S.Ct. at 3107. Likewise, justice would be poorly served if a conviction were reversed on a *per se* basis because a defendant claimed that an unanswered question shifted the burden of proof.

Petitioner's request for review of this issue should accordingly be rejected.

III.

THE TRIAL COURT PROPERLY REFUSED AN INSTRUCTION WHICH WOULD HAVE PERMITTED THE JURORS TO CONSIDER MERCY AS AN INDEPENDENT SENTENCING FACTOR.

Petitioner next argues that the trial court erred in refusing the mercy instruction he proffered, and erred in

giving a "no sympathy" instruction. This sort of argument was recently rejected by this Court in *California v. Brown*, 107 S.Ct. 837 (1987). Petitioner's claim should accordingly be rejected.

In *Brown, id.*, this Court affirmed that while jurors may not be instructed to ignore emotional responses which are "rooted in the aggravating and mitigating evidence," 107 S.Ct. at 840, jurors may be properly instructed to avoid basing their decisions on "*mere sympathy.*" *Id.* (emphasis in original). The trial court was accordingly justified in refusing Petitioner's proffered instruction which read:

In considering the death penalty, you may, if you choose to do so, consider whether or not you wish to extend mercy to the defendant.

(R. 2643)

Petitioner attempts to distinguish his case from *Brown* by claiming that the "no sympathy" instruction given at his trial did not make clear that the jurors could consider sympathy in the context of mitigating evidence. However, the considerations that governed in *Brown* govern here.

First, as this Court noted in *Brown*, it seems quite unlikely that jurors might completely ignore mitigating testimony simply because they have been instructed that they should not be influenced by sympathy or prejudice. 107 S.Ct. at 840.

Second, the "no sympathy" instruction given in the case at bar is properly considered only in context. The jurors were instructed not to be influenced by sympathy in the same instruction that directed that they were not to be influenced by prejudice, race, color, religion or national ancestry. It is highly unlikely that the jurors singled out "sympathy" from the other nouns contained in the instruction; it is much more likely, as in *Brown*, that the jurors considered sympathy as merely one of a catalog of con-

siderations that could not be properly considered at sentencing. See 107 S.Ct. at 840.

Petitioner's claim is accordingly disposed of under the principles set forth in *Brown*. Having failed to have presented to this Court an important or undecided question, Petitioner's request for review should be rejected.

IV.

THE "RISK OF NON-PERSUASION" IS NOT AFFORDED CONSTITUTIONAL PROTECTION.

Petitioner's final contention is that the Illinois death penalty statute is unconstitutional because, according to Petitioner, the statute places the "risk of non-persuasion" on the defendant. Petitioner's claim is without merit.

Under the Illinois death penalty statute, "[i]f the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death." Ill. Rev. Stat. ch. 38, § 9-1(g) (1985). Under the statute, then, neither defendant nor the People bear a burden of proof in a capital sentencing hearing.

Under Petitioner's theory, however, while a defendant may not bear a burden of proof or a burden of persuasion, a defendant does bear a "risk of non-persuasion" in a capital sentencing hearing. Petitioner's theory does not bear scrutiny: If it is true that a defendant bears a risk of non-persuasion at sentencing, that risk is no different from the "risk of non-persuasion" defendant bears during the guilt-innocence phase of his trial. Yet, the "risk of non-persuasion" present during the guilt-innocence phase is afforded no constitutional protection, so long as defendant is not charged with the burden of proving his inno-

cence. See *In Re Winship*, 397 U.S. 358, 364 (1970). The relevant point in the instant case is that Petitioner bore no burden in the sentencing phase of his trial.

Moreover, Petitioner's argument ignores the purpose behind Illinois' sentencing scheme. In *Furman v. Georgia*, 408 U.S. 238 (1972) and *Gregg v. Georgia*, 428 U.S. 153 (1976), this Court made clear that one of its primary concerns regarding death penalty statutes was the danger that the penalty was being imposed capriciously. 408 U.S. at 309-310; 428 U.S. at 198. In that the Illinois death penalty statute provides for particularized decisionmaking based upon the weighing of mitigating factors against aggravating factors, the Illinois statute sufficiently protects against capricious sentencing. The mere fact that neither party bears a burden of proof is not a constitutional infirmity, and Petitioner has not demonstrated otherwise.

Petitioner's request for review of this issue should accordingly be rejected.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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